

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 336

BURLINGTON TRUCK LINES, INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES ET AL.,

AND

No. 337

GENERAL DRIVERS AND HELPERS UNION,
LOCAL 534, ETC., APPELLANT,

vs.

UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION**

CIVIL DOCKET P-2306

Jury demand date:

BURLINGTON TRUCK LINES, INC., a Corporation,

—VS.—

INTERSTATE COMMERCE COMMISSION,

and

UNITED STATES OF AMERICA,

and

GENERAL DRIVERS & HELPERS UNION,

SANTA FE TRAIL TRANSPORTATION COMPANY,

Plaintiff-Intervener,

and

**WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER
CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT
TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC.,
INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES,
INC., and RINGSBY TRUCK LINES, INC., Plaintiff-Inter-
veners,**

and

**NEBRASKA SHORT LINE CARRIERS, INC.,
Defendant-Intervener.**

Attorneys for General Drivers & Helpers Union:

**David D. Weinberg & Arnold J. Stern, 300 Keeline
Building, Omaha, Nebraska; &**

For plaintiff:

Lowell R. McConnell, 1st Natl. Bank Bldg.;

**James A. Gillen and Russell B. James, 547 W. Jackson
Blvd., Chicago, Illinois;**

James M. Adams, 796 Pearl St., Galesburg, Illinois;

David Axelrod, Axelrod, Goodman & Steiner, 39 S.

La Salle St., Chicago 3, Illinois.

Attys. for Santa Fe Trail Trans. Co.

Starr Thomas & Roland J. Lehman, 80 E. Jackson
Boulevard, Chicago 4, Illinois;

For defendant:

Robert Ginnañe, Gen. Counsel, Interstate Commerce
Commission, Washington 25, D. C.;

Harlington Wood, Jr., U. S. Attorney.

Attys. for Plaintiff-Interveners:

David Axelrod, Axelrod, Goodman & Steiner, 39 South
LaSalle Street, Chicago 3, Illinois.

Attys. for Nebraska Short Line Carriers, Inc.

Nelson, Harding & Acklie, 605 South 12th Street,
Lincoln, Nebraska;

James S. Dixon, 1st Natl. Bank Bldg., Peoria, Illinois.

STATISTICAL RECORD

COSTS

J.S. 5 mailed 5/31/60

Clerk

J.S. 6 mailed 5-31-61

Marshal

Basis of Action: Appeal from
ruling of I.C.C. T. 27, USC,
Secs. 1336, 1398, 2284 & 2321

Docket fee

Witness fees

asking issuance of interlocu-
tory & per. injunctions against
defts and Three Judge Court—
other relief

Depositions

DATE	NAME OR RECEIPT NO.	REC.	DISB.
1960			
5/19	51160-Pltf	15.00	
5/23	Tr. U.S. CD#46-P		15.00
1961			
6/22	55911-Pltf. Int. Notice of Appeal	5.00	
6/26	Tr. U.S. Clerk's Fees, CD#50-P		5.00

DATE	NAME OR RECEIPT NO.	REC.	DISB.
1961			
6/23	53913-Pltfs. Notice of Appeal	5.00	
6/26	Tr. U.S. Clerk's Fees, CD#50-P		5.00
8/17	58887-Pltf.	13.60	
8/21	Tr. U.S. Clk's Fees—Costs on Appeal CD#7-P		13.60

[fol. 3]

DOCKET ENTRIES

DATE	PROCEEDINGS	DATE ORDER JUDGMENT NO.
1960		
May 19	Complaint filed.	
May 19	Summons issued.	
June 1	Summons filed. Mar. Ret. ent. executed on Attorney General U.S. 5/26/60— Ret. executed on Interstate Commerce Commission 5/27/60	
June 6	Order designating Hon. J. Earl Major & Hon. Omer Poos to serve with Hon. Frederick O. Mercer as members of a three-judge District Ct., filed & ent. (John S. Hastings, Chief Judge, U.S. Court of Appeals)	18-335
June 6	Mo. of Santa Fe Trail Transportation Co. to Intervene as Pltf., filed	
June 6	Stipulation between parties that leave be granted to Santa Fe Trail Transportation Co. to intervene as party-pltf. & that leave be granted to Santa Fe Trail Transportation Co. to file its Complaint instanter, filed	
June 6	Order granting mo. by Santa Fe Trail Transportation Co. for leave to intervene as party-pltf. & leave to file its Complaint, filed & Ent. (Mercer, J.)	18-336

DATE

PROCEEDINGS

DATE ORDER
JUDGMENT NO.

1960

June 6 Complaint of Intervener Santa Fe Trail Transportation Co., filed.

June 8 Case set for hearing of the three-judge court on seeking issuance of interlocutory and permanent injunctions against the U. S. of America and the Interstate Commerce Commission on Thursday, June 30, 1960, at 10:00 o'clock a.m., CDST.
(Mercer, J.)

June 16 At the request of all parties concerned, Ord. by ct. hearing of three-judge court set on 6/30/60 is canceled, Ent.
(Mercer, J.)

June 27 Mo. of Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., & Ringsby Truck Lines, Inc., to Intervene as P'tfs., filed

June 27 Stipulation by & between parties that leave be granted to the above-named to intervene as parties-plaintiff, filed & approved by ct.

June 27 Order Granting Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc. Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., Leave To Intervene as Parties-Plaintiff & To File Their Complaint, filed & ent.

(Mercer, J.) 18-353

June 27 Complaint of Interveners, filed

June 27 Case set for hearing of the three-judge court on seeking issuance of interlocutory & permanent injunctions against the U.S. of America & the Interstate Commerce Commission on Thur. Oct. 20, 1960, at 9:30 a.m. (CDST)
(Mercer, J.)

DATE

PROCEEDINGS

DATE ORDER
JUDGMENT NO.

1960

June 29 Motion to Intervene as a Deft., filed by Nebraska Short Line Carriers, Inc., a corp., with cert. of service.

July 1 Order granting mo. by Nebraska Short Line Carriers, Inc. for leave to intervene & granting them leave to file their answer instant., filed & ent. (Mercer, J.)

18-361

[fol. 4]

July 1 ANSWER OF INTERVENER, NEBRASKA SHORT LINE CARRIERS, INC., filed.

July 15 JOINT ANSWER OF U.S. OF A. and THE INTERSTATE COMMERCE COMMISSION, filed. (copies fwd. to Judge Major and Judge Poos)

Aug. 5 JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF WATSON BROS. TRANSPORTATION CO. INC., ET AL., filed. (copies fwd. to Judge Major & J. Poos)

Aug. 5 JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF WATSON BROS. TRANSPORTATION COMPANY, filed. (copies fwd. to Judge Major & J. Poos)

Aug. 10 Hearing by three-judge court set for Oct. 20, 1960 is canceled. Case set for hearing on Oct. 27, 1960, at 10:00 a.m. (Mercer, J.)

Oct. 24 Motion to Intervene as Party Plaintiff by General Drivers and Helpers Union, Local 554 of Omaha, Neb., filed with cert. of mailing.

DATE

PROCEEDINGS

DATE ORDER
JUDGMENT NO.

1960

Oct. 24 Mo. to Intervene as party pltf. by Genl. Drivers & Helpers Union allowed and Complaint of Intervener, General Drivers and Helpers Union, Local 554, Omaha, Neb., filed with cert. of mailing, Ent. (Mercer, J.) 18-446

Oct. 24 By agreement of all parties, ord. by ct. that hearing be con't. from Oct. 27, 1960 to Dec. 16, 1960, at 10:00 a.m. Ord. by Ct. that pltf. & intervening petitioners file written Briefs within 20 days from this date; defts. to file answering briefs within 15 days after receipt of pltf's' briefs, & pltf & intervening petitioners file reply briefs within 5 days after receipt of answering briefs. Ord. by ct. that copies of briefs filed by respective parties be given to opposing parties within periods herein set forth, Ent., (Mercer, J.) 18-446

Nov. 14 Memorandum Brief on behalf of pltf.-intervener, General Drivers & Helpers Union Local 554, filed with prf. of service.

Nov. 14 Brief of Burlington Truck Lines, Inc., Santa Fe Trail Transportation Co., Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., & Ringsby Truck Lines, Inc. filed

Nov. 30 Joint Answer of U.S. of America & Interstate Commerce Commission to Complaint of General Drivers & Helpers Union Local 554, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Intervener, filed.

Nov. 30 BRIEF for Interstate Commerce Commission & U. S. of America, filed.

DATE

PROCEEDINGS

1960

Dec. 1 Brief of Nebraska Shortline Carriers, Inc.,
deft.-intervener, filed.

Dec. 6 Reply Brief of Burlington Truck Lines, Inc.,
Santa Fe Trail Transportation Co., Watson
Bros. Transportation Co., Inc., Red Ball
Transfer Co., Interstate Motor Freight Sys-
tem, Inc., Independent Truckers, Inc., Illinois-
California Express, Inc., Interstate Motor
Lines, Inc., Navajo Freight Lines, Inc., and
Ringsby Truck Lines, Inc., filed.

[fol. 5]

Dec. 16 Cause called for hearing on a Three-Judge
Court for issuance of Interlocutory & perma-
nent injunctions agst. the defendants from or-
ders of the Interstate Commerce Commission.
Mo. by Lowell R. McConnell for leave to enter
his appearance as counsel for the pltf-inter-
vener, General Drivers & Helpers Union Local
554, affiliated with International Brotherhood
of Teamsters, Chauffeurs, Warehousemen &
Helpers of America. Mo. allowed. Mo. by
James S. Dixon for leave to enter his appear-
ance as counsel for deft-intervener, Nebraska
Short Line Carriers, Inc. Mo. allowed. By
agreement of all counsel, ord. by Court that
each side be allotted 1½ hours for arguments.
Mo. by John M. Daugherty, Ass't. U.S. Atty.
that Isaac K. Hay be allowed to participate
in this matter on behalf of Interstate Com-
merce Commission. Mo. allowed. Atty. for
U. S. of America informs Court that he con-
curs with the arguments of Isaac K. Hay,
counsel for Interstate Commerce Commission.
After hearing arguments Court takes cause
under advisement, Ent.

(Mercer, J.)
(Major, J.)
(Poos, J.)

18-502

DATE	PROCEEDINGS	DATE ORDER JUDGMENT NO.
1961		
Apr. 27	Opinion of J. Earl Major & Omer Poos, filed (Order of the Commission affirmed & Com- plaint of Pltf. & Complaints of Intervening Pltfs. dismissed for want of equity. Ent.) (Poos & Major, J.)	18-646
Apr. 27	Opinion of Frederick O. Mercer, filed (Commis- sion's order null & void, Ent.) (Mercer, J.)	18-646
Apr. 27	CLOSED J.-S. 6	
June 22	Notice of Appeal To The Supreme Court of The United States, filed by General Drivers & Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Pltf. & Intervener, filed with Proof of Service.	
June 23	Notice of Appeal To The Supreme Court of the United States, filed by Burlington Truck Lines, Inc., Santa Fe Trail Transportation Co., Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Inter- state Motor Lines, Inc., Navajo Freight Lines, Inc., & Ringsby Truck Lines, Inc., pltfs., with Proof of Service.	
June 30	Cross Designation by Defendant, Interstate Commerce Commission, of Additional Por- tions of Record to be Certified on Appeal to the Supreme Court of the United States, filed with Proof of Service.	
July 19	Order that orig. papers with exhibits be in- spected in Supreme Court of U.S. in lieu of copies & that the Clerk return same to this Ct. after appeal has been finally determined by Supreme Court, filed & ent. (Mercer, J.)	19-4

[fol. 7]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., Corporation, Plaintiff,

—VS.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

COMPLAINT—Filed May 19, 1960

Comes now plaintiff, Burlington Truck Lines, Inc., a corporation, by its attorneys, James A. Gillen, Russell B. James, James M. Adams and David Axelrod, and files this, its Complaint seeking issuance of interlocutory and permanent injunctions against the United States of America and the Interstate Commerce Commission and their officers and agents restraining enforcement of the orders of the Interstate Commerce Commission in the proceeding entitled "*Nebraska Short Line Carriers, Inc.—Common Carrier Application*, Docket No. MC-116067," and in support thereof, states as follows:

1. That jurisdiction is conferred upon this Court by virtue of Title 27 U. S. Code, Sections 1336, 1398, 2284 and 2321 through 2325, inclusive, which authorize interested parties to seek injunctive relief from orders of the Interstate Commerce Commission before United States District Courts composed of three Judges.

2. That plaintiff is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and authorized to engage in the transportation of general commodities to, from and between points in Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska and Wyoming,

pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-107500 and various subs thereunder. Its residence and principal offices are located in Galesburg, [fol. 8] Knox County, Illinois, and, therefore, pursuant to Title 28 U. S. Code, Section 1398, the venue of this action is in the United States District Court for the Southern District of Illinois, Northern Division.

3. That by application filed June 22, 1956 in Docket No. MC-116067, Nebraska Short Line Carriers, Inc. sought authority from the Interstate Commerce Commission to conduct operations as a common carrier in interstate or foreign commerce in the transportation of general commodities, with certain exceptions, over irregular routes, between Denver, Colorado and Chicago, Illinois; between Omaha, Nebraska and Chicago, Illinois; between Minneapolis, Minnesota and Des Moines, Iowa; between Council Bluffs, Iowa and St. Louis, Missouri, and between Lincoln, Nebraska and St. Joseph, Missouri, serving intermediate and off-route points on said routes. That by Recommended Report and Order served September 3, 1957, in Docket No. MC-116067, the Examiner recommended that said application be denied because applicant Nebraska Short Line Carriers, Inc. had failed to prove public convenience and necessity, and that

"In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and if a certificate is granted on the evidence herein, those protesting carriers who have been continuing to interchange normally would be injured along with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions

of the routes involved, and the shipments are moving through to destinations."

The Examiner recommended that a Complaint should be filed against those carriers who were failing to discharge their duties under the Interstate Commerce Act. A copy of the Examiner's Recommended Report and Order in Docket No. MC-116067 is attached hereto as Exhibit "A."

[fol. 9] 4. That by application filed January 10, 1957 in Docket No. MC-116067, Sub No. 2, Nebraska Short Line Carriers, Inc. sought authority to conduct operations as a common carrier in interstate or foreign commerce, in the transportation of general commodities, with certain exceptions, over irregular routes, between Omaha, Nebraska, on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming. That by Recommended Report and Order served August 8, 1957, the Examiner recommended that the application of Nebraska Short Line Carriers, Inc. in Docket No. MC-116067, Sub No. 2, be denied for the reason that applicant had failed to prove public convenience and necessity. He found that many carriers, including plaintiff, had offered continuous service to shippers in the involved area, and that "they (trunk line motor carriers) have also had the ability to provide a sufficiency of service of a quantity and quality which if freely and fully available, could have and would have met all the reasonable and well founded transportation requirements for motor service asserted on this record." Finding that the problem asserted has but one origin, labor pressure, the Examiner stated:

"There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just about what any reasonable prudent business man would have done in the face of these activities."

He further found that:

"It is obvious that it would be unwise to attempt to use the certificate provisions of the Act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union. In fact, that action could not be justified by anything in the Act."

[fol.10] The denial of the application of Nebraska Short Line Carriers, Inc. in Docket No. MC-116067, Sub No. 2, was sustained by the Commission by its order in Docket No. MC-116067 dated June 1, 1959. A copy of the Examiner's Recommended Report and Order in Docket No. MC-116067, Sub No. 2, is attached hereto as Exhibit "B."

5. That the applications of Nebraska Short Line Carriers, Inc. referred to above were opposed before the Interstate Commerce Commission by eighteen motor carriers, including the plaintiff herein, as well as certain rail carriers.

6. That by an order dated June 1, 1959, with four of the eleven Commissioners not participating in the decision, the Interstate Commerce Commission, a defendant herein, after consolidating the record in both applications, granted authority to applicant to operate as a common carrier by motor vehicle in the transportation of general commodities, with certain exceptions, over regular routes between Omaha, Nebraska and Chicago, Illinois, and between Omaha, Nebraska and St. Louis, Missouri, serving the intermediate point of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska. A copy of said order is attached hereto as Exhibit "C."

7. That by an order dated March 10, 1960, the Interstate Commerce Commission, a defendant herein, denied the petitions for reconsideration and/or further hearing which had been filed by certain protesting carriers, including the petition for reconsideration of Burlington Truck Lines, Inc., plaintiff herein, filed July 27, 1959.

8. That the decision of the Interstate Commerce Commission dated June 1, 1959, which the Commission in its order dated March 10, 1960 refused to reconsider, is contrary

to law and to the decisions of the Interstate Commerce Commission and Federal Courts.

9. That the Interstate Commerce Act requires in Section 207(a) (49 U.S.C. 307(a)) that an applicant [fol. 11] seeking authority to operate as a motor carrier in interstate commerce, prove and establish by clear and convincing evidence: (1) that a proposed new service will serve a useful purpose responsive to a public demand or need; (2) that the public cannot or will not be served as well by existing carriers, and (3) that the public can be served by applicant under the new service proposed without endangering or impairing the operations of existing carriers contrary to the public interest; and as a necessary corollary thereto, require the Interstate Commerce Commission, before granting a new certificate, to specifically find, based upon substantial evidence, that the requirements set forth in this paragraph have been met.

10. That Nebraska Short Line Carriers, Inc. failed to prove or establish by clear and convincing evidence that the public could not be or was not being served adequately by existing carriers.

11. That the Commission failed, specifically, to find, among others, that any inadequacy existed in the service being rendered by existing carriers, including the plaintiff herein, who opposed the application:

12. That the decision of the Interstate Commerce Commission is based solely and entirely upon allegations that certain shippers were unable to obtain transportation services from some carriers during an organizing campaign conducted in Nebraska by the International Brotherhood of Teamsters, a Labor Union as that term is defined in the Labor Management Relations Act, 29 U. S. C. 151 *et seq.*

13. That the evidence adduced at the various hearings conducted by the Interstate Commerce Commission to consider the applications of Nebraska Short Line Carriers, Inc. indicates clearly that the alleged deficiencies in service of some of the carriers, but not including plaintiff, were only temporary and were solely the result of the efforts

of the above named Union to organize various business enterprises in the State of Nebraska.

[fol. 12] 14. That the labor dispute which caused the temporary deficiencies in the service of some carriers was settled by April 4, 1957 when the hearing in Nebraska Short Line Carriers, Inc., Docket No. MC-116067, Sub 2 was held, and, therefore, the issues raised had already become moot; and although the Interstate Commerce Commission had granted authority to Nebraska Short Line Carriers, Inc. to temporarily operate for the purpose of relieving against the alleged deficiencies in service, the service of plaintiff Burlington Truck Lines, Inc. was never interrupted, and was available to all shippers who appeared to support the application of Nebraska Short Line Carriers, Inc. throughout the entire period involved.

15. That in granting a permanent certificate to Nebraska Short Line Carriers, Inc. in Docket No. MC-116067, based upon a temporary condition, the Interstate Commerce Commission misconceived the purpose and intention of Congress in Section 207(a) of the Interstate Commerce Act which authorizes the granting of a certificate based upon a permanent state of facts, and not predicated upon a transitory premise.

16. That the plaintiff and the various carriers who opposed the application of Nebraska Short Line Carriers, Inc. have no interest whatever concerning whether various business enterprises which the International Brotherhood of Teamsters sought to organize are or are not organized.

17. That Congress has provided adequate remedies to cope with labor relations problems as they may affect interstate commerce, and the administration of said laws has been assigned by Congress to the courts and administrative agencies having jurisdiction over both the Union and the various companies or corporations or businesses involved in a labor dispute.

18. That the Interstate Commerce Commission does not have jurisdiction to deal with or attempt to deal with labor disputes, except upon complaint as provided for in Section

[fol. 13] 212 of the Interstate Commerce Act (49 U.S.C. Section 312); and, that, in fact, the Interstate Commerce Commission has no jurisdiction whatever over the actions of labor organizations, and, therefore, cannot endeavor to remedy alleged problems which may arise as a result of labor disputes.

19. That Section 212 of the Interstate Commerce Act (49 U.S.C. Section 312) provides for the filing of Complaints against interstate motor carriers who wilfully breach their duty to provide interstate motor carrier service to the public; that said Complaint Section is the only remedy provided by said Act for wilful breaches of duty by interstate carriers, and that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty to existing carriers alleged to have violated their duty to the public; and certainly not as a penalty against plaintiff who has steadfastly discharged its motor common carrier service under its certificate, and provided uninterrupted, satisfactory and adequate service.

20. That plaintiff herein, as the record before the Commission shows, has expended large sums of money for the purpose of acquiring personnel, terminal facilities, motor carrier equipment, and other property necessary to provide motor carrier service to shippers in interstate commerce, and is authorized to and has and is rendering adequate service between Omaha and Chicago, St. Louis and Kansas City, the exact points between which the Interstate Commerce Commission granted a certificate to Nebraska Short Line Carriers, Inc.

21. That unless the orders of the Interstate Commerce Commission granting Nebraska Short Line Carriers, Inc. authority to operate as a result of an alleged deficiency in transportation service of some carriers, but not plaintiff, which occurred solely as a result of the organizational activities of the International Brotherhood of Teamsters [fol. 14] are enjoined and otherwise made null and void, plaintiff herein will lose substantial sums of money, and

be deprived of its right to enjoy the exercise of its certificate without unwarranted competition, as a result of an occurrence over which it had no control, which it did not create, and which it could not have prevented, thus resulting in a destruction of its own service.

22. That the assertion by the defendant Interstate Commerce Commission of a right to grant certificates of public convenience and necessity to carriers as a result of a temporary deficiency in service by some but not all the carriers in the field is contrary to the intention of Congress as expressed in the Interstate Commerce Act, 49 U. S. C. 1 *et seq.*, and the National Labor Relations Act, 29 U.S.C.A. 141, *et seq.*, constitutes an erroneous application and interpretation of Section 207(a) of the Interstate Commerce Act, and is arbitrary and capricious and without foundation in law or in fact.

Wherefore, plaintiff respectfully prays that upon the filing of this Complaint:

(1) The presiding Judge of this Court shall call to his assistance in the hearing and determination thereof, two other Judges of whom at least one shall be a Circuit Judge, and the Court thus constituted and convened shall hear this Complaint upon due and legal notice to the defendants in accordance with the provisions of 28 U. S. C. 2284 and 2321 to 2325;

(2) That upon final hearing of this case, the Court enter a decree which shall adjudge the orders of the Interstate Commerce Commission entered June 1, 1959 and March 10, 1960, in the matter of *Nebraska Short Line Carriers, Inc. Common Carrier Application*, Docket No. MC-116067, to have been entered in violation of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, and, therefore, that they are unlawful, null and void; and

[fol. 15] (3) That the plaintiff have such other and further relief in the premises as this Court may deem fitting, proper and appropriate.

Dated—May 6, 1960:

Burlington Truck Lines, Inc., a Corporation,

By: James A. Gillen, James A. Gillen, 547 West Jackson Boulevard, Chicago 6, Illinois;

By: Russell B. James, Russell B. James, 547 West Jackson Boulevard, Chicago 6, Illinois;

By: James M. Adams, James M. Adams, 796 Pearl Street, Galesburg, Illinois;

By: David Axelrod, David Axelrod, Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago 3, Illinois,

Its Attorneys.

[fol. 16]

EXHIBIT "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served SEP 3 1957

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 35 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 25 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-116067

NEBRASKA SHORT LINE CARRIERS, INC., COMMON CARRIER APPLICATION

Decided

Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle, of general commodities, with exceptions, over certain specified regular routes between various points. Application denied.

J. Max Harding, Irvin C. Levin, W. F. Manasil, and R. E. Powell for applicant.

I. J. Saccomanno for intervener in support of application.
David Axelrod, Homer E. Bradshaw, G. M. Brewer, Earl J. Brooks, Guy C. Chambers, Jack Goodman, William P. Higgins, Russell B. James, Robert H. Levy, Ralph B. Lockwood, Robert F. Munsell, S. F. Parelec, J. B. Reeves, J. R. Rose, Truman A. Stockton, Jr., David D. Weinberg, and Ed White for protestants.

REPORT AND ORDER

RECOMMENDED BY DONALD R. SUTHERLAND,
EXAMINER

By application filed June 22, 1956, as amended, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from and to the points, over the routes and in the manner set forth in [fol. 17] appendix A hereto. Certain carriers' and the

¹ Bruce Motor Freight, Inc., Brady Motorfrete, Inc., Burlington Truck Lines, Inc., Churchill Truck Lines, Inc., Denver-Chicago

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, hereafter called Teamster, oppose the application.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on certain days in January and February, 1957, at Lincoln. Briefs have been filed.

Applicant, a corporation organized initially on June 14, 1956, is authorized to issue 1,000 shares of common and 5,000 shares of preferred stock at \$100 per share.² At the time of hearing \$37,550 of common stock had been issued. This was held in varying amounts by the following short-line nonunion motor carriers operating between certain points in Nebraska: John Jack Romans, doing business as Romans Motor Freight, Fred L. and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, partners, doing business as McKay Freight Line, Waldo W. and Hubert B. Winter, doing business as Winter Bros., Abler Transfer, Inc., Herbert Peters, doing business as Fremont Express Co., Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Louis

Trucking Company, Inc., H. & W. Motor Express Company, Illinois-California Express, Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Prucka Transportation, Inc., Red Ball Transfer Co., Ringsby Truck Lines, Inc., Rock Island Motor Transit Co., Santa Fe Trail Transportation Co., Union Transfer Company, doing business as Union Freightways, Watson Bros. Transportation Co., Inc., herein called Bruce, Brady, Burlington, Churchill, D.C.T., H. & W., I. C. X., Independent, Interstate Motor, Navajo, P.I.E., Prucka, Red Ball, Ringsby, Rock Island Motor, Santa Fe Trail, Freightways, and Watson, respectively. The application is opposed also by class 1 rail carriers in western trunkline territory.

² When the organization was initially incorporated the shares of common stock had a par value of \$50 each, and the preferred was \$100 per share. Subsequently, after the incorporation papers were amended, the common stock was reissued in the amount of \$100 per share to comply with Nebraska laws. Each \$50 payment which had been made on stock constitutes a half share.

Steffensmeir, and Edward Steffensmeir, doing business as Steffy's Transfer, Norman J. Rezný and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, hereafter called, Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Frear, Derickson, Steffy, and Wilber, respectively, and Harvey Tillman of Tillman Transfer Company. Romans is President, C. C. McKay is Vice President, Walter F. Clark, Secretary, and Lyon is Treasurer. These same persons, along with Leonard Abler, are the directors. Some of the stock holders hold certificate from this Commission, and others have authority from the Nebraska State Railway Commission which they have registered with the Interstate [fol. 18] Commerce Commission under the second proviso of section 206(a) of the act. As here material, most of them are authorized to transport general commodities, with exceptions, between certain points in eastern and central Nebraska, including Omaha and Lincoln. One carrier, Derickson, operates between Grand Island and North Platte. Collectively, they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration.

Applicant's traffic manager has investigated the availability of terminal facilities at certain points and has been assured that necessary space is obtainable at Chicago, St. Louis, Kansas City, Minneapolis, and Denver. No investigation was made with respect to Des Moines. He has also found upon investigation that drivers and plenty of motor vehicles can be leased for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease some equipment from its stockholders or other motor carriers. No definite schedules have been set up regarding the proposed operations, and the frequency of such schedules would depend to some extent on the availability of traffic. Although the traffic manager indicates that one driver would be used on each vehicle at the beginning of operations, relay points would be established if necessary. It is estimated that the running time from Omaha to Chicago would approximate 18 hours. If the authority sought is granted, applicant proposes to hold such service out to the public generally. Its general manager indicated that no discrimination would be shown in selecting carriers for

interchanging traffic. As of January 26, 1957, applicant had total assets of \$32,785; liabilities of \$467, and net worth of \$32,318.

By order of December 4, 1956, in No. MC-116067 (Sub-No. 1) TA, the issuance of temporary authority to applicant was approved for 180 days upon compliance with certain requirements, which were met January 3, 1957. Joint petitions for reconsideration filed by Watson, Freightways, Red Ball, and Prucka, to the temporary authority order were denied by the Commission on February 25, 1957. The temporary authority is set forth in appendix B hereto. Temporary authority is granted under section 210a of the act, and such a grant creates no presumption that corresponding permanent authority will be granted thereafter. In No. MC-116067 (Sub-No. 2) applicant has applied for certain permanent irregular-route authority for the transportation of general commodities, with exceptions, between Omaha, on the one hand, and, on the other points in certain States. A hearing has been held on that application and the matter is still pending.

In or about May, 1956, the stockholders began to experience difficulty at Omaha, Lincoln, and Grand Island, Nebraska in respect of interstate traffic normally interchanged at those points with certain connecting motor carriers. For example, Romans was informed in Omaha by an official of Independent that the latter carrier was risking labor difficulties with its employees, who are members of Teamsters, if normal interchange of shipments between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956 were not accepted by that carrier. These shipments, which were not tendered to any railroad, were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it does not do so in every instance. [fol. 19] Furthermore, Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grant Island, particularly with Red Ball and Watson. Time is consumed in finding motor carriers willing to accept traffic, and

Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made periodically to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Romans has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight in 1956 decreased somewhat compared to the 1955 volume. His gross revenue in 1956 was \$159,280 and \$133,775 in 1955. Prior to May 1956, 30 percent of his traffic consisted of outbound shipments from the area he serves, and 70 percent was inbound. Presently, most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, Red Ball, Ringsby, Santa Fe Trail, and Watson; also with Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl's Express, Inc., Ideal Truck line, Iowa-Nebraska Transportation Co., Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm, Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company and Wright Motor Freight Lines, hereafter called B-C Cartage D.M.T., Haeckl, Ideal I.N.T., McMaken, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson, and Wright, respectively. These were most of the major motor carriers with whom interchange was effected. After the approximate date of May 7, 1956, they would not tender or accept freight from Romans at certain times, and this has continued. However, as previously shown, Burlington, Santa Fe Trail, and Rock Island have continued interchange with Romans, and Ringsby also

has accepted freight. Romans has not been requested by his employees to obtain a union contract. He does not think any of them are members of a union. There have been no strikes by his employees, and no pickets have been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk, and it serves Sioux City, Iowa, as well as Omaha. However, no terminal facilities have been operated by this carrier at Sioux City since about March 15, 1956, when certain unionized connecting motor lines serving that point discontinued normal interchange operations with Abler. Shortly thereafter, a similar discontinuance of normal interchange began at Omaha by most of the carriers with whom Abler interlined freight. Burlington and Santa Fe Trail continued to interchange traffic, and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Sturm. In June 1955, at both Sioux City and Omaha, Abler interchanged 400 shipments with Watson, and in June 1956, none were interchanged. In June 1955, at the same two points it received from 300 to 500 shipments from Freightways, and in June 1956, it interchanged about five shipments with that carrier. In the first nine months of 1956, Abler's gross revenue, including interstate and intrastate traffic was about \$70,000 less than that for the corresponding period of 1955. Abler was approached by union representatives, beginning in August 1955, relative to signing a contract. He was advised by one union representative that a drive was on for memberships in Nebraska and the nonunion motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebr. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of Omaha and Lincoln. On or about April 17, 1956, a large number of motor carriers discontinued normal interchange with McKay at Omaha and Lincoln. At Omaha and Lincoln in 1955, McKay received 1,215 interstate shipments by interline from other motor carriers, and in 1956 it received only 210. Gross revenue in 1955 amount to \$205,000, and \$156,000 in 1956. On some occasions McKay's driver was

permitted to pick up the necessary freight bills and shipments at certain connecting carriers terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April 17, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with McKay.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals about \$60,000 and approximately 40 percent of this amount is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa, and Crete, Nebr.

Tillman operates between Fremont and Lincoln. In 1956 this carrier grossed about \$47,000. About 10 percent of this was derived from transporting interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball, and McKay.

Peters operates daily between Omaha and Fremont and transports some interstate traffic between these points. At the time of hearing, Peters was still interchanging traffic with Prucka, Burlington, and I.N.T. He still interchanges freight now and then with certain other motor carriers, but not as frequent as formerly. Merchants, for example, before April 1956, gave Peters a substantial amount of traffic, but after that time very little. Also, certain traffic which Peters had received from Independent was given to Joe Roy Freight Line, hereafter called Roy. Most of Peters' present interchange traffic consists of shipments received in Omaha from National Carloading Company for delivery to Fremont. He grossed about \$20,800 in 1956 which compares favorably with other years, and about 85 percent of this revenue was derived from interstate business.

[fol. 21] Derickson operates daily over U.S. Highway 30, between Grand Island and North Platte and interlines traffic at those points with various motor carriers without any apparent difficulties. Derickson serves numerous consignees who route their traffic for ultimate delivery over his line. Derickson has a number of competitors between Grand Island and North Platte, and considers the service he renders between these points as adequate.

Steffy operates over routes between Omaha and Creston, Nebr., and between Dodge, Nebr., and Sioux City. Some of Steffy's authorized points on and near Nebraska Highway 91, east of Creston, are not known to be served by any other motor carrier on a regular basis. It interchanges interstate traffic with various motor carriers at Omaha. Its profit in 1955 amounted to about \$6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh, and Central City. He serves about 30 Nebraska points, regularly, and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters (Local No. 554) to sign a contract. Lyon inquired whether the union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the union to induce Lyon to sign a contract and when these attempts failed normal interchange ceased at Omaha on or about March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a regular basis, viz., Bos Truck Lines, Inc., hereafter called Bos, Burlington, Ringsby, D.M.T., and National Carloading. Also, at the time of hearing he was interchanging with merchants on Minneapolis St. Paul traffic. D.M.T., and Prucka tendered some freight to Lyon during the last week of January, 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments; however, there have been instances when Lyon has not been given freight by these carriers which was routed over his line. The authority sought by applicant between Central City and Omaha duplicates Lyon's and Romans' operating rights between these points, and Lyon does not believe there is any need for additional service on that

portion of the route between Omaha and Central City. There have been no strikes or labor disputes on Lyon's line, and no pickets at his places of business.

Winter operates between Omaha and Lincoln. The amount of interstate traffic transported by this carrier between these points is small. Winter's representative believes more interstate traffic would be obtained if the application herein is granted.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in south-[fol. 22] eastern Nebraska, including operations from Pawnee City to Lincoln; Lincoln to Beatrice; and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points southeastern Nebraska, including operations between Superior and Hastings; Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route. The operations, however, can be connected by the use of certain described irregular route authority.

Clark operates over regular routes between Omaha, Lincoln, and south Sioux City, on the one hand, and, on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove, and Madison. It serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its interstate traffic at Omaha, and some at Lincoln. About 90 percent of its traffic is transported between Omaha at Norfolk. In 1955 Clark grossed \$286,346, 40 percent from interstate and 60 percent from intrastate traffic. In 1956 gross revenue was \$217,412, 4 percent from interstate and 96 from intrastate. Prior to September 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955, representatives of Teamsters (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955 a picket line was placed at Clark's Omaha terminal. Thereafter, deliveries of interchange

traffic to Clark's terminal at Omaha ceased generally. Clark did, where possible, deliver outbound interchange shipments to connecting carriers. On or about October 1, 1955 Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board, hereafter called NLRB. This action culminated in a signing of a settlement agreement on December 7, 1955 by representatives of Local No. 554, Fred L. Clark, and a representative of NLRB. The agreement was approved December 8, 1955 by the Regional Director of NLRB. Among other things, the agreement provided for the posting of a notice at the business office of Local No. 554 in Omaha. The notice in effect stated that the union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D.M.T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials, or commodities or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the union as the collective bargaining representatives of its employees, unless and until the union had been certified as such bargaining representative in accordance with the provisions of section 9 of the NLRB Act. This notice was also posted at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers was resumed for awhile until Clark's interline business dropped noticeably after January 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington and Wilson. Pickets, however, remained at Clark's terminal and were still there in March 1956. One of Clark's former employees (employed [fol. 23] prior to September 14, 1955) is a picket. No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On September 14, 1955, he had seven employees.

Clark sought further relief and the NLRB obtained a temporary injunction on behalf of Clark against the union

signed by the Chief Judge of the United States District Court for the District of Nebraska on July 30, 1956. The order of the Court, pending final adjudication by the NLRB of the matter involving Clark and the union,³ was calculated to enjoin picketing at the premises of motor carriers and shippers who did business with Clark and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where the object was to force or require said carriers or employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the Teamsters (Local No. 554) or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters or such other labor organization was certified as the representative of said employees in accordance with section 9 of the NLRB act. Thereafter, Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances are shown where D.M.T., Maackl, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Santa Fe Trail, with one exception, has accepted freight from Clark. In nearly every instance Clark has been able to find a motor carrier willing to accept the interstate shipments. No instances are cited where rail carriers ever refused any shipments tendered by Clark. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments.

³ Hearing on this matter was held before an NLRB examiner in May 1956.

⁴ Carriers' premises specifically named in the order were those of Santa Fe Trail, D.M.T., I.N.T., Merchants, Bos, Independent, Wilson, Trans-American, and Red Ball.

In regard to the NLRB proceeding involving Clark and the union, on December 26, 1956, an order was entered by NLRB requiring Teamsters (Local No. 554) to cease and desist from certain unfair labor practices in violation of section 8(b)(4)(A) and (B) of the National Labor Relations Act, and directing the union to take certain affirmative action, including the posting of a described notice. A copy of the NLRB order and a copy of the notice attached to that order are set forth in appendix C hereto. The NLRB order refers to certain employers at which premises notices should be posted by Teamsters Local 554. In addition to Clark, the employers identified in the NLRB record as affected by the Union's unfair labor practices are: C.A. Swanson & Sons; Omaha Cold Storage Company; Wilson Packing Co.; Swift & Co.; Santa Fe Trail; D.M.T.; Beacons [fol. 24] Van & Storage Co.; Independent; I.N.T.; William A. Volker & Company; Bos; Sinclair Refining Company; Wilson Truck Lines; Red Ball; Haeckel; Merchants; and Darling Transfer Co.

Generally, the stockholders of applicant, with the exception of Clark, have had no dispute of strike with their employees. They are parties to certain tariffs published by certain rate bureaus and have executed concurrences for the interchange of freight on through routes and through rates with various connecting motor carriers, including protesting motor carriers herein who also are parties to the tariffs published by the described rate bureaus. They hold themselves out to transport interstate freight on a through route-through rate basis. As to Clark, it has received only one cancellation notice on concurrences, from Riss and Company. If the authority sought herein is granted, the stockholders intend generally to enter into tariff concurrences with applicant and interline traffic thereunder.

SHIPPER EVIDENCE

The shippers and consignees in support of the application are located at Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. Generally,

with some exceptions, the traffic of these shippers and consignees involve less-than-truckload shipments.

Arcadia—The witness from this point operates the only drug store which serves an area of about 10 miles. No motor carrier serves Arcadia regularly other than Romans and that carrier is selected by the consignee to deliver his shipments which originate in or near St. Louis. Certain regular stock orders are received about twice a year, and additional shipments approximately every six weeks. Rail service is available to Arcadia, but freight trains do not arrive daily. Prior to the spring of 1956, motor carrier service was used more extensively than rail for the delivery of shipments and such service was satisfactory. After that time certain of consignees shipments which had been routed by motor carrier all the way from origin to Arcadia began to arrive by rail. In some instances Watson transported shipments to Grand Island and delivered them to the railroad for movement to Arcadia. Some of the commodities involved were drugs which required expeditious delivery and the described combination motor-rail service was too slow. These shipments were routed by Watson and "Loup Valley", a carrier which had discontinued serving Arcadia. Since the shipments were routed by motor carrier the consignee expected that they would be delivered in this manner, and no authority was given to divert the shipments to rail. Some of the drugs require protection against freezing and because they are perishable motor carrier service is designated. Delivery of the described shipments by rail instead of motor vehicle resulted in drayage expenses and inconvenience to the consignee. Consignee has not given any consideration to using an originating carrier other than Watson from St. Louis, but has no objection to using Burlington to transport his shipments from that point. If the authority sought is granted, consignee would route shipments by applicant to Omaha or Grand Island and thence by Romans to Arcadia.

[fol. 25] *Burwell*—Certain retail establishments at this point receive small shipments from Chicago, Des Moines, Kansas City, St. Louis, Minneapolis, and Denver, and pay the freight charges thereon. Prior to April, 1956, an auto-

mobile dealer received regular stock orders and rush shipments from Des Moines by motor carrier; also certain rush orders from Kansas City. On such traffic he specified Romans as the delivering carrier but did not designate the origin carriers. D.M.T. originated shipments in Des Moines, and the 2-day service rendered from that point was satisfactory. Red Ball originated the Kansas City shipments. After April 1, 1956, his shipments began arriving in Burwell by rail although he continued routing by Romans. In one instance the consignee was out of certain parts ordered from Kansas City. These were transported to Omaha by Red Ball and forwarded to Burwell by rail. This type of service was too slow and inconvenient. In the three months prior to February 1957, however, the Kansas City shipments were again being delivered by Romans. D.M.T. also forwarded a Des Moines shipment from Omaha by rail to Burwell, which service was unsatisfactory and slower than the all motor carrier service. In addition to the normal freight charges which consignee pays, certain other expenses were incurred on the combination motor-rail service. Consignee complained to its supplier in Des Moines and after July 9, 1956, some shipments were transported by D.M.T., and delivered by Romans. However, certain shipments routed by motor carrier from Des Moines were still delivered by rail. Since April, 1956, consignee has had difficulty in preparing its stock orders properly because of irregular delivery service. Sometimes when the placement of a current order is due, consignee has not yet received the previous order. In January, 1957, a shipment of parts from Des Moines was delivered by Romans. On Des Moines shipments, consignee has not requested its supplier to use a different origin carrier, although he has no objection to the use thereof.

A Burwell clothing merchant and a drug store owner have had experience similar to those of the automobile dealer. Shipments to them from Denver, St. Louis, and Kansas City routed by motor carrier have been diverted to rail. A shipment from Denver and two from St. Louis in the fall of 1956 destined to the clothing merchant were diverted by Watson to rail at Grand Island. In fact, from May through October, 1956, numerous shipments were re-

ceived from St. Louis and Denver with some delivered by rail as described and some by Service Oil Company, hereafter called Service Oil, a competitor of Romans. Prior to the spring of 1956 this consignee had arranged to route most of his merchandise "by truck" and Romans, who serves Burwell regularly, usually delivered the shipments. Consignee operates on a small inventory and prompt service is important. In or about October 1956, he requested suppliers to ship certain sized shipments by rail all the way because the combination rail motor service resulted in extra charges. Since then most of his shipments have been transported all rail and this is slower than the previous all-truck service. In January 1957, a shipment originating in St. Louis was delivered by Romans, and consignee desires the continuation of deliveries by that carrier. The drug store in Burwell, which pays the freight on some shipments, serves a substantial area, and it requires daily service by [fol. 26] motor vehicle because its business is conducted on a low inventory. Rail service to Burwell is provided three days per week. Prior to the early summer of 1956, all its shipments from Chicago, St. Louis, Kansas City and Denver moved by truck and were delivered by Romans, which service was satisfactory. Thereafter, it began to receive shipments by rail. For example, a shipment in August was transported by Red Ball from Kansas City to Omaha and diverted to rail for delivery. This combined motor-rail service was slow and inconvenient. This consignee is willing to use a motor carrier for service from Denver to Grand Island for interchange with Romans at that point instead of Omaha.

A butter factory at Burwell ships truckloads of butter to Chicago. Each truckload, which moves about twice monthly, weighs 30,000 pounds, and is valued at \$18,000. Since the butter is perishable the shipper requires a dependable motor carrier service from origin to destination. Rail service is available from Burwell only on a tri-weekly basis, and shipper's factory is not located on a rail siding. The shipper does not route the traffic beyond Omaha, leaving it up to Romans to select a connecting carrier. Prior to March or April 1956, this arrangement was satisfactory and the butter usually was delivered in Chicago on the

second day. In some instances the trailers of Independent were loaded in Burwell by Romans and the shipment moved to Chicago without transfer of lading. Watson was also used as a connecting carrier. After April 1956, on two occasions, the consignee in Chicago phoned the shipper to inquire about shipments that had not yet been received. Because of this and the prevailing situation there is some anxiety on the shipper's part concerning the delivery of its shipments. However, all butter shipments tendered to Romans have moved to destination, and generally deliveries have been made on the second morning. The owners of the butter factory also operate an oil company in Burwell, retailing gasoline, oil, tires, auto accessories, and certain related commodities. The oil company had not received any inbound shipments from Chicago since the spring of 1956 and its representative was not certain whether any had originated at Minneapolis since that time. Some tanks had been received from St. Louis in May or June 1956, but it was not known definitely how this traffic was shipped.

Ord—Since July 1, 1956 a leather goods store had received about 57 shipments and approximately 37 originated at Chicago, Minneapolis, St. Louis, Kansas City, Denver, St. Joseph, and Des Moines. Its business is operated on a small inventory and prompt delivery is required on most shipments. Since about 1952 Romans has been designated by consignee to deliver most of the traffic although occasional shipments move by rail. Rail, however, is not satisfactory because daily service is not available at Ord. During the last six months of 1956 certain shipments from St. Joseph, Denver, Kansas City, Minneapolis, St. Louis, and Denver were delivered by motor carriers other than Romans. For example, a shipment from Minneapolis in November on which the consignee had requested shipper's salesman to route by Romans for delivery was transported to Grand Island by Watson and transferred to Portis Transfer, hereafter called Portis. Service Oil has also delivered some shipments. Certain shipments from St. Joseph and [fol. 27] Denver were routed rail from those points by the suppliers. The service of the other delivering motor carriers is not as satisfactory as that of Romans because the

latter conducts a daily service at Ord. This store has no objection to using Burlington as an origin carrier from the points that carrier serves, and consignee recognizes that its suppliers might not have specified Romans as the delivering motor carrier in all instances.

A clothing store at Ord receives shipments from Chicago, Louis, Kansas City, St. Joseph, Denver, and Des Moines. pays the freight charges, and motor carrier service is used more than rail for the necessary transportation. For a long time Romans has been designated as the delivering carrier on shipments from St. Joseph and Kansas City, and Romans has also delivered some Chicago shipments. Railway Express Agency, Inc., is used on shipments from Denver and St. Louis. Motor carrier shipments are received from Des Moines about twice a year. In or about June 1956, consignee began receiving deliveries by motor carriers other than Romans. Portis, in particular, has been delivering most of the shipments. Also, a shipment originating at Chicago in September 1956, was transported by combination motor rail. Prucka transported this shipment from Chicago to Omaha and transferred it to rail for delivery to Ord. This type of service was slow compared to the all-motor service rendered in connection with Romans. Also, the service by Portis is unsatisfactory because deliveries are usually made in the afternoon whereas Romans makes morning deliveries. Portis was requested to make morning deliveries but could not do so under its operating schedules. The availability of daily delivery service by motor carrier is important in the proper functioning of consignees business.

A firm at Ord prints and publishes newspapers, magazines, catalogs, advertising material, and engages in certain other related activities. It ships a considerable amount of material to Chicago and some to Kansas City and Denver. It also buys certain supplies machinery, and repair parts in Chicago, and certain supplies and repair parts in Kansas City. Motor vehicle service is used for certain shipments to Chicago regularly and some traffic moves to Denver in this manner. Shipments to Kansas City, Minneapolis and St. Louis usually do not move by truck. Prior to the summer

of 1956 this shipper used Romans in conjunction with Independent for service to Chicago and such service was satisfactory because customers could usually be assured of delivery within four days. Since that time certain of the Chicago customers have complained about delays in getting some shipments, and witness indicates some shipments take seven days for delivery. Some of the material shipped, such as monthly magazines, is dated and prompt delivery at destination is required. Also, catalogs for certain seasons of the year require expeditious and dependable handling. Presently, shipper can not assure its customers definitely of deliveries within a specified time and shipper's representative believes it has lost some business due to this situation. Shipper permits Romans to select the connecting carrier used beyond Omaha and witness could not name any carrier other than Independent which had been used beyond that point. This shipper also designated Romans to deliver [fol. 28] inbound shipments from Chicago, and sometimes it specified the origin carrier. The inbound service prior to the summer of 1956 was satisfactory, but after that time the transportation on some shipments was slow. Burlington has not been specified to originate any Chicago shipments. Prior to the spring of 1956 some shipments from Kansas City were transported by Burlington to Omaha for delivery by Romans and this service was satisfactory. After that time, however, one shipment was received by rail but witness did not know whether or not it had been routed in this manner all the way from Kansas City.

Newman Grove.—A farm implement and machinery company receives shipments of repair parts from Kansas City, Kans. Regular stock orders are received about once a month and supplementary orders about once a week. Prior to the summer of 1956 these shipments were transported by Red Ball and Darling to Omaha and transferred to Lyon for delivery. Since that time carriers other than Lyon have been making deliveries. In some instances shipments were delivered by one of these other carriers to Neligh and the consignee had to pick them up at that point. Also, Roy has delivered some of the shipments to Newman Grove. Generally, the service of these carriers was not satisfactory

because there had been some delays in receiving shipments and extra expense incurred by consignee. When Lyon delivered the shipments, service into Newman Grove was rendered four or five times a week. Roy does not render such frequent service. Frequent service, however, is required because some parts moving from Kansas City are needed by farmers to repair their harvesting machinery. Although rail service is available at Newman Grove, it is not rendered on a daily basis. Consignee has no objection to using Burlington or Santa Fe Trail as origin carriers if satisfactory service can be rendered.

A creamery in Newman Grove ships truckloads of butter regularly to Chicago. It selects Lyon to transport the shipments to Omaha, but does not designate the carrier beyond, although it has the privilege to do so. Usually, Lyon has interchanged the shipments at Omaha with I.N.T. Although on two occasions (in the summer) complaints have been made on the condition of the butter when received at destination, most of shipments have been transported to Chicago satisfactorily. The creamery has not endeavored to obtain single-line motor carrier service from Newman Grove to Chicago or to route its shipments beyond Omaha over Burlington's line. Rail service is not used because it is not available daily at Newman Grove. In addition to outbound traffic, the creamery receives occasional shipments of supplies from Kansas City, Minneapolis and Chicago which are shipped by motor vehicle. The creamery does not designate the origin carrier on such shipments. It does, however, specify Lyon for delivery. In 1956 deliveries were made by other carriers. This was not satisfactory because of delays. In four months prior to February 14, 1957 most of the inbound shipments were delivered by Lyon. Abler and Clark delivered some shipments, and such service was satisfactory. The creamery is willing to use Burlington in connection with Abler and Clark if the traffic would move without delay. Rail is used for some inbound shipments but [fol. 29] is not satisfactory for all, principally because such service at Newman Grove is provided less frequent than required.

Sargent—A department store at this point receives shipments from Kansas City, St. Louis, Minneapolis, Chicago,

St. Joseph, and Des Moines. Prior to the summer of 1956, its traffic from these points was received by rail, motor carrier, and parcel post. Motor carrier shipments, with a few exceptions, were delivered by Romans, and such service was satisfactory. Consignee paid the freight charges on most shipments. Generally, consignee did not designate the origin carriers on the motor carrier shipments delivered by Romans. After the summer of 1956, motor carrier shipments began to arrive by rail and the receipt of merchandise was delayed; also, some extra expenses were incurred by the consignee. For example, a shipment in August 1956 was transported by Prucka to Omaha and transferred to rail for delivery to Sargent. In early September, Merchants did the same thing on a shipment from St. Paul. Consignee then advised his suppliers to use all-rail service and since September 1956 deliveries of interstate shipments from the above-described origins have been made in this manner. Rail is a little slower than the all-motor service. Consignee is aware of no motor carrier other than Romans who serves Sargent regularly. One of Romans' drivers suggested that consignee route its traffic via Grand Island instead of Omaha but this advice was not followed.

A retail hardware store at Sargent receives shipments from Kansas City and St. Joseph. Prior to the summer of 1956, it used motor carrier service for transportation. Some of its customers, particularly contractors, desire expeditious deliveries of merchandise and motor carrier service is needed to satisfy their demands. Romans and another motor carrier (which sold its business) delivered most of the shipments and such service was satisfactory. Consignee began receiving its shipments by rail and in September 1956 it changed to that mode of transportation. Thereafter, it changed back to motor service. It designates Romans to suppliers' salesmen for deliveries but does not specify the origin carriers. In January 1957, consignee began receiving satisfactory service again with Romans as the delivering carrier.

A dealer in farm machinery, implements, and supplies, receives motor carrier shipments from a point near Minneapolis. The prior service with Romans as the delivering

carrier was satisfactory, but in September, 1956, consignee requested its supplier to use rail the entire distance. This resulted from the fact that D.M.T. had transported a shipment to Omaha and transferred it to rail for delivery to Sargent. Rail deliveries are not satisfactory because daily service is not available at Sargent. Daily service by motor carrier is required for some shipments, particularly on parts which are needed by farmers for repair work. Consignee is not aware of any motor carrier other than Romans who serves Sargent regularly. When prior motor carrier service was used, consignee attempted to designate the origin carrier in certain instances but the supplier did not follow such designations.

[fol. 30] *Pierce*—A hardware merchant at this point receives merchandise from Minneapolis and most of the shipments are transported by truck. He operates on a low inventory and prompt deliveries by motor vehicle are required. Although he designates the delivering carrier, suppliers select the origin carrier. Prior to March 1956, Hess Motor Express, Inc., (now Murphy Motor Freight Lines), hereafter called Hess, transported the shipments from Minneapolis to Sioux City, and Abler delivered them to Pierce. This service was satisfactory. In March 1956, Hess refused to transfer certain Minneapolis shipments of consignee to Abler because the latter was a nonunion carrier. Consignee needed the merchandise involved, and traveled to Sioux City personally to pick up the shipments. After this experience he tried using rail service which was not satisfactory. He changed back to motor service and Middlewest Motor Freight (now Barber Transportation Company), hereafter called Middlewest, began delivering shipments. This service from Minneapolis is not as fast as that rendered when Abler made deliveries prior to March 1956. If applicant is granted authority from Minneapolis, consignee believes it can obtain satisfactory service by way of Omaha even though this is a more circuitous route than shipment via Sioux City.

Tilden—A retailers of petroleum products, tires, and accessories receives shipments from Des Moines and Kansas City by motor vehicle. He designates Clark to handle de-

liveries and the suppliers select the origin carriers. Prior to the spring of 1956, the motor carrier service with Clark making deliveries was satisfactory. Since that time deliveries have been made by Middlewest, Abler, and Lyon. Shipments handled by Middlewest moved through Sioux City to Neligh, and are then delivered from that point to Tilden. Usually, about one week is required to deliver shipments from Kansas City and Des Moines. Consignee receives better service than this when the shipments are handled by Abler because Omaha is used as an interchange point instead of Sioux City.

Loup City—A dealer in farm equipment and small trucks receive shipments of truck parts from Kansas City. Prior to the summer of 1956, Romans and his predecessor, Loup Valley, delivered this traffic. Consignee paid the freight charges on some shipments and others were prepaid. Consignee had been routing this traffic via Darling from Kansas City to Omaha and thence by Romans to Loup City. In or about June 1956, deliveries were made by Arrow Freight Line, hereafter called Arrow. This was satisfactory, except Arrow delivered shipments in the afternoon whereas Romans made morning deliveries. Arrow, however, discontinued serving Loup City directly and transferred the shipments to Romans or Service Oil at Grand Island, which resulted in three-line service and consignee received its merchandise a day or two later.

Neligh—An automobile dealer at this point receives emergency shipments of parts from Des Moines. Normally, these shipments were transported by D.M.T. to Omaha and thence to Abler or Clark, which were designated by consignee, for delivery. Usually, three-day service was rendered by the described carriers and such service was satisfactory. In the spring of 1956, Middlewest and Lyon began to deliver shipments and delays in receiving parts occurred. Instead of three-day service from Des Moines consignee in some instances received five-day service. Lyon's service usually has been quicker than that of Middlewest. Although the supplier at Des Moines, on many shipments, attempts to honor consignees' designations of delivering carriers, it does not do so in all instances. On

some occasions, at consignee's request, Burlington has been used from Des Moines. The supplier, however, usually selects the origin carrier, and D.M.T. is used more frequently than Burlington. In some instances, when Burlington originated shipments, the service has been satisfactory, and at other times it has not. It is indicated, however, that shipments moving via Burlington and Abler have been transported satisfactorily. Recently, when Burlington was used from Des Moines, Abler rendered the delivery service.

Norfolk—A tire dealer, who operates on a small inventory, receives shipments principally from Kansas City, Chicago and St. Louis. Clark and Abler, which were designated by consignee, delivered the shipments and this service was satisfactory. In the fall of 1955, consignee began receiving shipments by other carriers. For example, a shipment from Kansas City was transported by Red Ball to Omaha and transferred to Roy instead of Clark. Consignee refused delivery by Roy, and the shipment was returned to Omaha. The merchandise finally was reshipped from Omaha and delivered by Clark. A shipment from St. Louis routed over Watsons' line for transfer to Clark was delivered by Roy. The service rendered by Roy is comparable to that rendered by Clark and Abler from Omaha to Norfolk. Recently, Burlington has been used for some shipments from Chicago and Kansas City, and these were transferred to Clark as requested. Such service was satisfactory. On other shipments from those points consignee's routing instructions were not honored by the suppliers who used other origin carriers. Freightways has transported some shipments from Chicago and transferred them to Midwest. Since October 1956, consignee's shipments, with some exceptions, have been delivered by Clark and at the time of hearing service was reasonably satisfactory.

A seed dealer at Norfolk receives shipments principally from Kansas City, Des Moines, and Chicago, and occasional shipments from Minneapolis and St. Louis. It operates on a small scale and requires expeditious transportation in some instances to replenish its stocks. It does not use rail service. It pays the freight on some shipments and

the suppliers on others. In the summer of 1955 most of the shipments from Kansas City were transported by Watson, Prucka, Red Ball and Burlington, and transferred to Abler or Clark at Omaha for delivery. This service was satisfactory. In or about July 1956, consignee began receiving deliveries by other motor carriers, including Roy. In September 1956, it requested the Kansas City supplier to use Burlington and since then shipments from that point have been received satisfactorily. It has not designated specific origin carriers from Des Moines or Chicago. Usually, Watson originates the shipments from Chicago, Minneapolis, and St. Louis, and Burlington from Des Moines. [fol. 32] A dealer in outboard motors, boats, marine hardware and related articles receive shipments from Kansas City, and St. Joseph, on which he pays the freight. He does not maintain a larger stock of boats or motors, and frequently customers' purchases are ordered directly from the supplier. Therefore, expeditious transportation is required. Prior to April 1956, Darling transported the shipments from St. Joseph and Kansas City to Omaha and Abler delivered them. Consignee designated such service and it was particularly satisfactory because Abler notified the consignee prior to actual delivery of certain boats and other bulky merchandise. This permitted consignee to arrange deliveries directly to his customers. In some instances Clark was used and provided a similar service. In or about April 1956, deliveries were made by other motor carriers, including Roy, even though Abler was still designated by consignee to handle the shipments. In January 1957, however, consignee routed a shipment from St. Joseph by Burlington and this was delivered by Abler. Apparently this service was satisfactory.

A retailer of plumbing fixtures, water softeners, and related supplies receives shipments from Chicago on which it designates the routing. Prior to September 1955, it used either Independent or Freightways from Chicago to Omaha and thence Abler or Clark to Norfolk. Since then the shipments have been delivered by other carriers, including Roy and Midwest. In or about December 1956, consignee began routing its shipments from Chicago via Burlington; when Abler was specified as the delivering carrier, the rout-

ing was followed, but when Clark was designated the shipments usually were delivered by Roy. Consignee has no objection to using Ringsby from Chicago to Omaha if its service is as good as that of Burlington.

A dealer in heating and air conditioning equipment receives most of its shipments from Marshalltown, Iowa, and occasional freight from Des Moines, Chicago, Kansas City, and St. Louis. It pays the freight on this traffic, and routes the shipments from Marshalltown. The suppliers at Chicago, Kansas City, and St. Louis select the carriers used from those points and the dealer designates the delivering carrier. The dealer installs equipment in buildings at Norfolk and points nearby. Frequently, shipments from the described origins are made direct to the job sites. Prior to the fall of 1955, Bos was used from Marshalltown to Omaha and Clark delivered the shipments. This service was satisfactory, particularly since Clark made deliveries direct to job site and operations of the dealer and its installation crews could be conducted efficiently. Although in 1956 Clark was still designated by the dealer on routings, certain shipments were delivered by other motor carriers, including Roy. Since the dealer was not certain his shipments would be delivered by Clark, some equipment which normally would have been routed directly to nearby job sites was routed to Norfolk. Clark is located at Norfolk, and the dealer finds it convenient to obtain information from that carrier concerning its shipments. He tried rail service on a shipment from Marshalltown but this was too slow to meet his needs. The dealer has no objection to using Santa Fe trail for shipments from Kansas City. It [fol. 33] has complained to Bos about disregarding routings, but still receives shipments by carriers other than Clark.

A processor of dairy products at Norfolk receives shipments principally from Chicago, and some traffic from Denver, Kansas City, St. Louis, Des Moines, and Minneapolis. It pays the freight charges on a large percentage of the shipments from Chicago. Although it designates Clark and Abler for delivery of shipments, the suppliers usually select the origin carriers. Watson and Burlington, among others, have been used from Chicago. When Abler

and Clark were used for deliveries, the service was satisfactory. In the latter part of 1955 deliveries were made by motor carriers other than those designated, including Roy and Midwest. Delays occurred, and consignee complained to Watson. However, shipments from Chicago originated by Watson continued to be delivered by Roy.

The Young Men's Christian Association at Norfolk receives shipments of various supplies from Chicago, Kansas City, and St. Louis, and pays the freight charges thereon. Prior to September 1955, Clark was designated as the delivering carrier, and service by motor vehicle from the above-named points was satisfactory. After that time consignee's designations of Clark were disregarded on numerous shipments and deliveries were made by other carriers, including Roy. Consignee has requested suppliers in Chicago to use Burlington; and those at Kansas City to ship by Santa Fe Trail. Shipments from those points are still delivered by Roy contrary to routings. In one instance, although Santa Fe Trail in conjunction with Roy rendered second day service on a shipment from Kansas City to Norfolk, consignee refused to accept it. It was ultimately delivered by Clark. The Norfolk Chamber of Commerce also supports the application.

Columbus—A company at this point is engaged in manufacturing farm and industrial equipment, including corn cribs, grain bins, crop-drying machines, and power steering devices. It receives various raw materials in considerable quantities from numerous points, including Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Ill., and Hammond, Ind. The majority of the inbound shipments are carloads transported by rail, and motor carrier service is used also. Outbound shipments are made to various points. During the last ten months of 1956 it made slightly over 1,200 shipments from Columbus, and 57 of these were destined to points on the routes involved herein. Prior to the summer of 1956 Lyon was used satisfactory as the originating carrier on some outbound shipments and delivered certain inbound traffic. Since then certain shipments routed from Columbus over Lyon's line have not been accepted by connecting carriers. In addition to Lyon a number

of other motor carriers served Columbus directly, including Watson, Ringsby, Bos, Freightways. Also, this manufacturer operates some of its own motor vehicles. Generally these are used to points such as Chicago, where inbound shipments can be picked up for return to Columbus. Watson and Freightways have been used for some shipments from Chicago to Columbus and such service was satisfactory.

[fol. 34] *Fairbury*—A chain organization engaged in operating variety and department stores receives a wide range of commodities from Minneapolis, St. Paul, Chicago, Kansas City, and St. Louis. A considerable amount of the shipments from these points is transported by motor carriers. Consignee pays the freight charges on about 75 percent of these inbound shipments, and instructs its suppliers to use McKay as the delivering carrier. Various motor carriers have been used from the origins, including Burlington, Watson, and D.M.T. The motor carrier service prior to April 1956, was satisfactory. After that time consignee's designations of McKay were not honored, and it began to receive deliveries by Superior. That service, however, was not maintained with sufficient regularity to satisfy the consignee. Because its motor carrier routings were not honored completely, consignee began using rail service more extensively. Such service, however, is slower than the prior motor carrier service rendered in conjunction with McKay. Although Superior was still delivering some shipments in or about the latter part of 1956, McKay was not delivering any at that time to consignee.

[fol. 35] A wholesale and retail store engaged in selling paint, wallpaper, floor covering, and other merchandise receives shipments by motor carrier from St. Louis, Chicago, Lyons and Joliet, Ill., Kansas City, Minneapolis-St. Paul, and Des Moines. Prior to April 1956, most of the motor carrier shipments from the described origin points were transported by Watson to Lincoln and thence McKay to Fairbury. This service was satisfactory. Then other carriers, including Superior, began making deliveries contrary to designated routings. Consignee is not satisfied with Superior's service entirely because there have been some delays. Shipments from Chicago, in which consignee

is particularly interested, were not received as expeditiously as formerly. Consignee attempted to route Chicago shipments via Burlington but the supplier used other originating carriers, including Watson and Independent. In May 1956, consignee began using rail transportation more extensively from Chicago, which is slower than the service previously rendered by Watson and McKay.

A company at Fairbury manufactures pump jacks, cylinders, water supply equipment, and windmills. It is also a wholesaler of plumbing supplies. It receives shipments from Chicago, Kansas City, St. Louis, Des Moines, and Denver. Finished products are shipped from Fairbury to various points. The majority are routed by the consignees, and some by the manufacturer. It has used the joint service of McKay-Watson on shipments moving to certain undisclosed destinations in Iowa and Illinois. Prior to April 1956, a majority of the inbound shipments were delivered by McKay, whom the manufacturer designated on most orders. This service in conjunction with the origin carriers was satisfactory. In April 1956, Superior began delivering shipments, but such service was not entirely satisfactory because delays occurred in receiving merchandise. The manufacturer's purchasing agent was then instructed to use rail as much as possible for shipments from Chicago. However, this shipper still routes many shipments by McKay, who makes some deliveries, and such service has been satisfactory. The manufacturer is still not entirely satisfied with Superior's service. It has no objection to using Burlington or Ringsby as origin carriers from Chicago. On outbound shipments the manufacturer honors consignees' routings, and McKay is designated in some instances to originate shipments.

Lincoln—A wholesale drug company receives shipments from various points. Most of its traffic originates in Chicago, St. Louis, and Kansas City. Since its warehouse space is limited, it buys in small quantities. Because of this method of operation expeditious deliveries by motor carrier are required. Various motor carriers are used to originate shipments from Chicago, including Independent, Red Ball, Haeckl, Freightways, Watson, and Prucka; Bur-

lington, Watson, and Freightways are used extensively from St. Louis; and Red Ball, Watson, Prucka, and Freightways from Kansas City. No complaint is made regarding the service from St. Louis and Kansas City, but dissatisfaction is expressed concerning the delay in receiving some shipments from Chicago, particularly in the winter in respect of commodities requiring protection from freezing. Consignee complained to Red Ball who is rendering single-line service to Lincoln, and discovered that carrier did not always have protective equipment available for daily service to Lincoln. Sometimes shipments requiring such protection were loaded in equipment moving to Omaha and at other times they were held in Chicago until such equipment [fol. 36] was available for Lincoln. Carriers other than Red Ball provide protective service from Chicago, and Burlington in particular is willing to provide such service to consignee.

A large department store in Lincoln receives shipments from Chicago, Minneapolis-St. Paul, Denver, St. Louis, Kansas City, St. Joseph, and Des Moines. Most of the shipments are received collect. The stores advertising schedules and receipt of merchandise are coordinated and for this reason delays in transportation are avoided as much as possible. Various motor carriers are used for service from Chicago, including Red Ball, Watson, Freightways, and Haeckl. Red Ball transports most of the traffic from Chicago. Generally, it renders second and third morning deliveries, and service from that point, with some exceptions, has been reasonably satisfactory. Carriers used from St. Louis include Burlington and Watson. Generally, Burlington has provided second and third morning delivery service which is satisfactory. Service from Kansas City is rendered by various carriers, including Red Ball, Watson, and Burlington. Red Ball transports most of its shipments from Kansas City and such service generally has been satisfactory. The service of other origin carriers from Kansas City has been satisfactory, with some exceptions. Freightways is used for most shipments from Minneapolis, and service from Minneapolis-St. Paul is reasonably adequate. Red Ball is used for shipments from St. Joseph, and, with some exceptions, the service has been

reasonably adequate. The service from Des Moines and Denver also has been reasonably adequate. Consignee's representative is aware that shipments from Chicago, Minneapolis-St. Paul, Des Moines, and Denver, if transported in single-line service by applicant to Lincoln, would have to move through St. Joseph, providing a circuitous routing. Use of applicant's proposed operation would depend on its ability to render service comparable to that provided by existing carriers.

Omaha—A heating and air conditioning equipment contractor receives most of its traffic from Marshalltown, and occasional shipments from Kansas City, Chicago, and Denver. It pays the freight charges on such shipments. Usually, most of the installations are made by consignee between May 15 and October 15 of each year. His storage space is limited and dependable motor carrier service is required for a continuous flow of merchandise. Normally, Bos is used to transport the shipments from Marshalltown to Omaha. Between May 1, and October 1, 1956, the Sheet Metal Workers Union placed certain pickets at the contractor's place of business and at certain job-sites where he was making installations. The pickets were not his employees or former employees. It is indicated that the contractor and his employees had refused to join the Sheet Metal Workers Union. Although Bos continued to deliver these shipments to Omaha it would not make deliveries direct to the consignee because of the pickets. The consignee, therefore, used his own small truck and some of his skilled employees to pick up shipments at Bos' terminal in Omaha. He then endeavored to use I.N.T. from Marshalltown but that carrier's drivers would not make direct deliveries past the pickets either. Consignee is not aware of any single-line motor carrier service from Marshalltown to Omaha other than Bos and I.N.T. Railroad service has been used also but consignee was required to pick the shipments up at the rail carrier's freight depot. Since about October 1, 1956, Bos has been making deliveries direct to consignee's place of business because the picketing had ceased.

[fol. 37] A manufacturer in Omaha, hereafter called shipper, makes various wood products, including frames

for upholstered furniture, bases for television sets, and cabinets. Shipments are made to Chicago, Minneapolis, St. Louis, Kansas City, Des Moines and Denver. Also, inbound shipments of various materials are received from these points. The above-described bases require continual expeditious transportation from Omaha for delivery in Chicago at certain times to coincide with production of the television sets. Cabinets also require expeditious transportation. Prior to October 18, 1956, shipper used numerous motor carriers, including Prucka, Watson, Freightways, Merchants, Independent, Ringsby, and Santa Fe Trail for service to and from its plant. Rail service is used for outbound carload shipments. Shipper, however, does not use less-than-carload service of the railroads very extensively. It prepays some outbound shipments. Shipper routes some inbound shipments, and others are routed by the suppliers. On or about October 11, 1956, a representative of the Upholsterers' International Union of North America, AFL-CIO, requested shipper to rehire certain employees who had been discharged. Additionally, the Upholsterers' Union requested that its business agent be recognized as bargaining representative for shippers' employees. Apparently, the Upholsterers' Union had filed with NLRB unfair labor practice charges against shipper and no determination had yet been made on such charges, and no election had been held by the employees to certify that Union as their bargaining representative. On October 18, 1956, about 15 employees went on strike and approximately 85 continued working. Thereafter, drivers of the carriers which shipper and used formerly would not pass the picket lines to pick up or deliver merchandise. Shipper, therefore, had to engage local cartage companies to pick up or deliver its freight at terminals of the line-haul carriers. Shipper spent about \$500 weekly in obtaining the service of local cartage companies. This situation continued until January 28, 1957, when the unfair labor practice charges were withdrawn by the Upholsterers' Union. Thereafter, the line-haul carriers resumed pick up and delivery service at shippers' plant.

A storage company operates two storehouses in Omaha. General commodities, with some exceptions, are stored for

numerous shippers, including some nationally known tobacco manufacturers and certain packinghouses. Generally, the shippers' commodities are moved to the warehouse and reshipments are made from time to time therefrom to various destinations. In some instances, on both inbound and outbound traffic, the storage company is permitted to route shipments. Rail and motor carriers have been used to and from the warehouses, and prior to May 1956, the transportation service was satisfactory. The list of motor carriers which it has used includes Freightways, Watson, D.M.T., Brady, Prucka, Santa Fe Trail, Bos, Darling, Ringsby and Red Ball. In 1956, up until May 18, merchandise (not including household goods) received by motor vehicle at the Omaha storehouses approximated 7 million pounds, and a substantial amount of this traffic originated in Chicago, Kansas City, St. Louis, and Minneapolis. Since about May 24, 1956, when a picket of Teamsters was placed at each of the storehouses in Omaha, deliveries by the line-haul motor carriers ceased generally, and only sporadic interstate shipments have been moved to the warehouses by for-hire motor carriers. In some instances shippers did not know there were pickets at the storehouses, and for [fol. 38] warded merchandise to Omaha. This resulted in the tracing of shipments to the terminals of certain carriers, and occasionally shipments had been moved to the storehouses of competitors. Prior to the placement of pickets, Teamsters had requested the storage company to pay its employees established union wage rates. The employees of the warehouses are not members of Teamsters and the latter did not represent them. The storage company has never been advised by the NLRB of any charges being filed with that agency by Teamsters. It had not instituted any action of its own with the NLRB.

Customers were informed of the situation in Omaha, and the storage company began using rail for inbound shipments normally transported by motor vehicle. On June 30, 1956, it lost the account of one large meat packer whose products had been stored in Omaha and reshipped to various points in Iowa, including Marshalltown, Cedar Rapids, Boone, Ames, Des Moines, Davenport, Carroll and Denison. Because of the existing situation it is said that the

storage company is placed at a competitive disadvantage. From time to time since May 24, 1956, it has attempted, without much success, to obtain normal service again direct to the warehouses by the described line-haul motor carriers. Recently, some meat products (which do not require refrigeration) have been transported satisfactorily from Chicago by W. N. Morehouse, Nelson Truck Line, and E. E. Haugarth. Apparently, however, these carriers are restricted to the transportation of packinghouse products. In respect of outbound service, as recently as February 20, 1957, it attempted without success to obtain a pick up by some line-haul motor carriers of a small shipment of personal effects for transportation to Chicago. Generally, the drivers of the line-haul carriers have continued to refuse to pass the pickets at the storehouses.

A representative of the Nebraska Resources Foundation testified in support of the application. Generally, this organization is engaged in bringing in new industries to Nebraska. In recent years it has been instrumental in obtaining the establishment of new factories at certain points in Nebraska, including Lincoln, Kearney, Columbus, Hastings, and Fremont. When attempts are made to induce industries to locate in Nebraska the question of adequate transportation in and out of the new plant sites is important. This representative believes that the more transportation service Nebraska has available the better it will be able to compete with other areas for new industries.

The former owner of Independent, under subpoena by applicant, also testified. Prior to January 1956, Independent interchanged with certain carriers, including Abler, Clark, Lyon, McKay, and Romans. In fact, from January 1 to September 1, 1956, Romans leased terminal facilities from Independent at Omaha. In May of that year, however, Independent refused to interchange certain shipments with Romans. Witness recalled that he understood at that time that Romans was involved in a labor dispute and that the management of Independent was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it that was their own responsibility".

[fol. 39] Galveston Truck Line Corporation, hereafter called Galveston Truck, intervened in support of the application. That carrier holds certain certificates from this Commission in No. MC-8544 and subnumbers thereunder authorizing operations in interstate or foreign commerce as a motor common carrier, over irregular routes, of general commodities, with exceptions, from and to certain points and areas in Texas and Oklahoma. It is authorized also to transport specified commodities from and to certain points. In No. MC-8544 (Sub-No. 15) an application is pending before the Commission in which Galveston Truck seeks authority to extend its general commodity operations from and to certain points, including Kansas City, Kans., and the commercial zone thereof. Intervener, a nonunion carrier, is interested in and supports the instant application because it desires to interchange traffic with applicant at Kansas City if its own extension application is approved and applicant obtains the authority sought herein.

The testimony of an inspector of the Nebraska State Railway Commission was also offered by applicant. This testimony involved principally the service rendered by Portis between Grand Island and Ord. Portis interchanges interstate traffic at Grand Island with certain carriers, including Watson, and the evidence indicated that Portis does not render daily service between Grand Island and Ord.

Certain other consignees located at Arcadia, Norfolk, and Ord were present at the hearing in support of the application. It was stipulated by counsel that if called as witnesses their testimony both on direct and cross examination would be the same or similar to that presented by other witnesses from the same points. If the authority sought is granted, the supporting shippers and consignees generally would route their traffic over applicant's line for connection with the operations of the stockholders, principally at Omaha and Grand Island.

EVIDENCE IN OPPOSITION TO THE APPLICATION.

Evidence in opposition to the application was offered by Burlington, D.C.T., Freightways, I.C.X., Independent, Interstate Motor, Navajo, P.I.E., Red Ball, Ringsby, Santa Fe Trail, and Watson. The evidence presented by these motor carriers also included testimony by representatives of Barber and Roy. On behalf of the railroads evidence in opposition was offered by the Chicago, Burlington and Quincy Railroad Company, Chicago and North Western Railway System, Chicago, Rock Island and Pacific Railroad Company, Missouri Pacific Lines, and Union Pacific Railroad, hereafter called C.B. & Q., C.N.W., C.R.I.P., Missouri, Pacific, and Union Pacific, respectively. Each of the opposing motor common carriers held certificates from this Commission authorizing the transportation of general commodities, with exceptions, in interstate or foreign commerce, between various points over specified regular routes. Collectively, the routes over which these motor carriers are authorized to operate coincides substantially with those described in the instant application, and they serve the principal points named therein. Freightway's operations almost completely duplicate those sought, except that it has no routes between Kansas City and St. Louis. Burlington operates between Omaha and Lincoln on the one hand, and, on the other, Chicago, St. Louis, Des Moines, Kansas City, St. Joseph, and Denver, and it serves numerous intermediate points, including Grand Island. Red Ball serves Omaha, Lincoln, and Grand Island, and numerous other [fol. 40] Nebraska communities, and its routes extend from those points to Denver, Kansas City, St. Joseph, Chicago, and Sioux City. Watson also serves numerous Nebraska communities, including Grand Island, Norfolk, Fremont, Columbus, Omaha, and Lincoln, and its routes extend from those points to Minneapolis-St. Paul, Des Moines, Chicago, Kansas City, St. Joseph, St. Louis and Denver. It also serves Marshalltown. It renders daily service from Omaha to Lincoln, Fremont, Columbus, Grand Island, and Hastings. Ringsby's operations between Denver and Chicago via Omaha and Des Moines, includes service to various Nebraska points, including Lincoln, Grand Island, Fremont,

Norfolk, and Sioux City. Generally, however, unless Ringsby has a truckload for Norfolk, service to that point is rendered by interchange. Similarly, although Independent holds authority to serve Lincoln, it interchanges less-than-truckload shipments moving to or from Lincoln with connecting carriers at Omaha. Truckloads, however, are delivered to Lincoln direct. Freightways can render direct service between Marshalltown and Omaha.

Terminals are maintained by protestant motor carriers at various points in the area involved. Most of them have terminals at Denver, Omaha, Chicago, and Kansas City, and some have terminals at St. Joseph, St. Louis, and Lincoln. Certain of the carriers have terminals at St. Paul, Sioux City, Des Moines, Grand Island, the Greenmont. Additionally, Watson has a terminal at Columbus, which is shared with another carrier. These protestants operate numerous motor vehicles including certain refrigerator equipment. Service is rendered daily by them between the principal points they are authorized to serve, and normally they use either a relay system or two drivers on a vehicle for continuous operation of their equipment between terminals. For example, Watson operates overnight schedules between Omaha, on the one hand, and, on the other Chicago, Denver, Des Moines, Kansas City, St. Louis, and Minneapolis-St. Paul; and second morning service between Chicago and Denver. Daily service is rendered from Chicago, St. Louis, Kansas City, St. Joseph, and Denver to Lincoln. Red Ball operates daily schedules between Chicago, on the one hand, and, on the other, Omaha, Lincoln, Sioux City, and Denver; between Kansas City, on the one hand, and, on the other, Omaha, and Lincoln, including service at St. Joseph; between Omaha and Denver; and Omaha and Sioux City. Overnight schedules are operated by Red Ball in the majority of instances, although it is apparent that operations between Chicago and Denver would take longer resulting in second morning or second day service. Service rendered by D.C.T. between Chicago and Denver, and between St. Louis and Denver is second morning or second day. Interstate Motor also offers second morning service between Chicago and Denver, and between Kansas City and

Denver. Independent offers second morning service between Chicago and Denver, and so does Freightways.

Generally, the equipment of the opposing motor carriers is not being operated to capacity, and they are in a position to transport additional traffic. Interstate Motor transports more traffic westbound from Chicago and Kansas City to Denver than it does in the reverse direction. It is anxious, therefore, to obtain additional eastbound traffic from Denver. I.C.X. also desires to obtain additional traffic from Denver moving eastbound to balance its westbound operations from Chicago. Ringsby is interested, among other things, in obtaining additional traffic from Chicago and Denver into Omaha where it has established its own terminal. Representatives of the opposing carriers believe [fol. 41] a grant of the authority sought herein would affect protestants adversely. Freightways, for example, suffered a decline in gross revenue in 1956 of about \$200,000, and it made only a slight profit in 1956.

The opposing motor carriers transport a considerable volume of traffic between the points they serve and they interchange with connecting carriers at various points. Omaha is one of the principal points for interchange of traffic, and considerable interchange is performed at Lincoln, Grand Island, and Sioux City by certain of the opposing motor carriers. Certain of the evidence pertaining to interchange at Omaha, Lincoln, Sioux City and Grand Island is pertinent here. Burlington offered exhibits covering generally a period during the last six months of 1956, and January 1957. This evidence shows that Burlington has continued to interchange with applicant's stockholders at Omaha and Lincoln on interstate traffic originated at or delivered to various points in Nebraska. Specifically, numerous interstate shipments were received by Burlington at Omaha from McKay, Clark, and Abler, and some from Romans, Superior, and Lyon. Numerous interstate shipments were transferred at Omaha to Romans, McKay, Clark, and Abler. During the same period of time Burlington interchanged numerous interstate shipments with McKay and Lyon at Lincoln. Some of the shipments included in Burlington's exhibits cover shipments of certain supporting shippers or consignees, originating at or destined

to Norfolk, Arcadia, Sargent, Ord, Fairbury, Neligh, and Burwell.

In 1955, and 1956, at Omaha, Santa Fe Trail interchanged interstate traffic moving from and to Nebraska points with Abler, Wilber, Clark, Peters, Lyon, McKay, Pawnee Transfer, Romans, and Steffy; also, with Superior Transfer, in 1956. In most instances Santa Fe Trail delivered considerably more traffic to these carriers than it received. During the same years at Lincoln, it interchanged traffic with McKay, and in 1956, with Winter and Tillman.

A representative list showing a portion of the interstate shipments interchanged by Independent at Omaha during 1956 (except January) shows that most of the traffic was given to Roy for delivery to Norfolk, Pierce, Newman Grove, Neligh, Meadow Grove, and Tilden. Certain shipments for Ord, North Loup, and Loup City were transferred to Arrow. United Freight received some for Loup City, Ord, and Burwell, and a carrier named Burnham received a shipment for Burwell. With respect to certain unrouted shipments for Norfolk and Pierce, which were transferred to Roy, examination by applicant's counsel of the freight bills covering such shipments revealed that "Abler" had been written thereon by Independent's routing clerk and then scratched over in favor of Roy.

An exhibit offered by Red Ball shows that it interlined approximately 430 shipments at Omaha in November 1956 destined to various Nebraska points which are served either by Abler, Clark, Lyon or Romans. All of these shipments, however, were given to carriers other than Abler, Clark, Lyon and Romans for delivery. The list of connecting carriers which delivered the shipments includes Schuyler Transfer, Interstate Freight Lines, and Mauch Transfer, hereafter called Schuyler, Interstate Freight, and Mauch, respectively, and Roy, Heuton, Brandt, and Service Oil. During the same month Red Ball received about 17 shipments collectively, from Roy, Schuyler, Interstate Freight, Mauch and Brandt, for movement to points beyond Nebraska.

[fol. 42] A representative list of over 500 interstate less-than-truckload shipments interchanged at Sioux City by Watson on traffic moving to Nebraska points, from May 1,

1956 to and including January 31, 1957, shows Middlewest as the connecting carrier in most instances, with Barber and D. & T. Transfer, hereafter called D. & T., receiving some shipments. Many of the shipments originated at points on the routes over which applicant seeks to operate. Routings on about 40 of the shipments were disregarded by Watson and given to a carrier other than the one specified. During the same period of time Watson interchanged numerous interstate shipments at Omaha destined to points in Nebraska, and in certain instances disregarded the routings shown on the freight bill. Watson also offered evidence showing interchange of 94 interstate shipments at Grand Island, between September 27, 1956 and January 16, 1957, destined to Ord. All of these shipments were transferred to Portis, although 21 were routed for delivery by Romans. In respect of service involving the supporting department store at Lincoln, during the last 8 months of 1956, a representative list shows Watson delivered directly to the store numerous shipments which originated at Kansas City, St. Louis, Minneapolis, St. Paul, Chicago, and St. Joseph, and the transit time in most instances was one or two days. An exhibit was offered also by Watson showing that it had transported numerous shipments originating at various points beyond Nebraska, including Kansas City, Chicago, Minneapolis, St. Paul, St. Louis, Denver, and St. Joseph directly to Columbus.

An exhibit of Freightways shows that this protestant, from January 20 to September 4, 1956, interchanged over 900 less-than-truckload interstate shipments at Sioux City and Omaha, collectively, destined to various points in Nebraska. A considerable amount of this traffic originated at numerous points on the routes over which applicant seeks authority, and the list of connecting carriers to which the shipments were given at Omaha and Sioux City includes Middlewest, Roy, Brandt, Schuyler, Interstate Freight, Arrow, Heuton, D. & T., Mauch, Superior, Wilber, Abler, Romans, McKay, and Steffy. Considering the number of shipments involved, applicant's stockholders received a small amount of traffic compared to that given to Middlewest, Interstate Freight, and some of the other connecting lines. Shipments to Fremont were transported directly to

that point by Freightways. Although Freightways can serve Norfolk, O'Neill, Valentine, Columbus, Grand Island, Hastings, West Point, Neligh, and Schuyler, Nebr., on certain days it does not have sufficient freight to justify operation of a vehicle to those points and the traffic is interchanged with connecting lines to expedite deliveries. Numerous shipments were transported by Freightways from Chicago, St. Paul, Denver, and Kansas City to the described department store at Lincoln, from July 30, 1956 through January 29, 1957; generally, transit time on the Chicago, St. Paul and Denver shipments ranged from two to three days, and the Kansas City shipments from one to three days.

Barber, since about January 2, 1957, has operated under the general commodity certificate formerly held by Midwest in No. MC-30857. That certificate authorizes operation in interstate or foreign commerce over specified routes between Ainsworth, Nebr., and Sioux City, and between Neligh and certain other points in Nebraska. By certain recently acquired general commodity authority, Barber also operates between Valentine and Omaha over certain specified regular routes. It maintains terminals at certain points, including Omaha and Norfolk, and operates numerous vehicles. One of its vehicles leaves Omaha daily at about 4:30 p.m., for various Nebraska points it is authorized to serve.

Roy is authorized to transport general commodities, with exceptions, between Omaha and Norfolk over U. S. Highway 275; and between Columbus and Fremont over U. S. Highway 30, serving all intermediate points. He is authorized also to transport general commodities, with exceptions, from "Norfolk and vicinity to and from Ainsworth, Nebr., and occasionally to and from points in the State of Nebraska at large", with certain restrictions. He operates six tractors, six trailers, and two trucks, and maintains terminals at Omaha, Norfolk, and Fremont. An exhibit offered in evidence shows that Roy received numerous interstate shipments at Omaha in December 1956, and in January 1957, from various carriers for movement to Nebraska points beyond Norfolk, and it transferred such shipments to Clark at Norfolk. In 1956, Roy received from various carriers at Omaha numerous interstate shipments destined to Nor-

folk which were delivered to that point directly by Roy. The witness representing Roy admitted that certain shipments transported to the Young Mens Christian Association in Norfolk have been refused because they had been routed for delivery by Clark.

As here relevant, C.R.I.P. operates over a network of rail lines extending from Chicago, on the east to Denver, on the west via Des Moines, Omaha, and Lincoln, and from Minneapolis-St. Paul, on the north to St. Louis and Kansas City, on the south. In addition to Omaha and Lincoln, it serves certain other points in southeastern Nebraska. It also serves St. Joseph. It renders daily merchandise car service between Chicago, on the one hand, and, on the other, Omaha, Denver, St. Louis, Kansas City, and Minneapolis-St. Paul; between Denver, on the one hand, and, on the other, St. Louis, Kansas City, and Omaha; and between Kansas City and St. Paul. C.N.W. as here material, operates over a system of rail lines extending from Chicago, on the east, to Lander, Wyo., on the west, via Omaha, Norfolk, and Chadron, Nebr., and from Minneapolis-St. Paul, on the north, to Des Moines, and Lincoln, on the south. Its lines also extend to numerous points in southeastern Nebraska, including Superior. Among other things, it operates through less-than-carload merchandise cars daily between Chicago and Omaha, and between Minneapolis-St. Paul and Omaha.

C.B. & Q., operates over a network of rail lines extending from Chicago, on the east to Denver on the west, via Omaha and Lincoln, and between Minneapolis, on the north and St. Louis, Kansas City, and St. Joseph on the south. In addition to Omaha and Lincoln, it serves numerous other points in various areas of Nebraska, including Grand Island. C.B. & Q., offers through less-than-carload merchandise car service between Chicago on the one hand, and, on the other Omaha, Kansas City, Minneapolis-St. Paul, and St. Louis; between St. Louis and Kansas City, on the one hand, and, on the other, Omaha and Denver; and between St. Joseph and Omaha.

[fol. 44] Missouri Pacific's lines, as here relevant, extend from St. Louis to Omaha, Lincoln, and certain other points in southeastern Nebraska, via St. Joseph and Kansas City.

This protestant operates two less-than-carload merchandise cars daily between St. Louis and Omaha; one merchandise car between St. Louis and St. Joseph daily, and at least one daily between Kansas City and Omaha. The above-named rail protestants handle carload as well as less-than-carload traffic between the points they serve, and interchange such traffic with connecting railroads for transportation to and from points between their own lines. They are ready, willing, and able to transport additional traffic. All of the points on the above-named protestants' rail lines pertinent to the instant application are not open and prepay stations.

Union Pacific's lines, as here pertinent, extend from Council Bluffs, Iowa, Omaha, Kansas City, and St. Joseph, on the east to Denver on the west. In addition to Omaha, it serves numerous points in Nebraska, including Lincoln, Grand Island, and North Platte. Although most of the Nebraska points it serves are open stations, some do not have any agent of their own and are served from another station nearby. Union Pacific operates scheduled freight trains between various points, including service between Council Bluffs (Omaha) and Kansas City, between Lincoln and St. Joseph, and between Council Bluffs (Omaha) and Denver. It interchanges traffic with other railroads at various points, including Council Bluffs, Kansas City, and Denver. In connection with other railroads, it participates in merchandise car service between Chicago and Denver; between St. Louis, on the one hand, and, on the other, Omaha, North Platte, and Denver; St. Louis and Kansas City, and between Minneapolis-St. Paul and Omaha. It also renders merchandise car service on its lines between Denver and Kansas City, and between Denver and Omaha. It transports carload as well as less-than-carload traffic, and can render additional service of this nature.

[fol. 45]

BRIEFS

In its brief, applicant argues principally that the free flow of interstate commerce via motor carrier has been obstructed and impeded through the failure and refusal of protestants and other unionized carriers to give the required

service; that such obstruction deprives many Nebraska communities of needed interstate transportation service from or to manufacturing and distributing points outside Nebraska; that Omaha business concerns supporting the application are entitled to door-to-door service in order to remain in business on a competitive basis; that a formal complaint is not the only remedy available; that the application is based solely on public convenience and necessity; that the evidence shows there is a real demand and need for the proposed service; that when protestants and other line-haul carriers refuse to provide their respective portion of the through movement, the Commission has no alternative but to authorize another carrier who will perform the required service to enter the field, and that it is fit and able to conduct the motor carrier operations proposed.

In their briefs, protestants assert that the application be denied. They argue principally that applicant has not shown that the existing transportation service between the points involved is inadequate; that it has failed to prove the stockholders of applicant are unable to conduct interchange operations with existing line-haul carriers; that, if applicant's allegations of refusal to interchange are true, a complaint should be filed by the stockholders with this Commission instead of an application for authority; that motor carriers are not enjoined by part II of the act to follow designated routings; that the matters involved herein are within the exclusive jurisdiction of the NLRB; that if applicant's stockholders are involved in alleged secondary boycott activities on the part of Teamsters, they have an adequate remedy in the courts and before the NLRB. It is contended further that the power to issue certificates granted by Congress to this Commission was never intended to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes, and that grants of authority based on evidence of the sort presented herein would result in two types of carriers, union and nonunion. Rail carriers contend that they should not be confronted with another common carrier competitor operating along their principal routes simply because of the labor differences of several nonunion motor carriers serving various interior Nebraska

communities. They also question applicant's fitness and ability to conduct the extensive operations sought.

DISCUSSION AND CONCLUSIONS

Before discussing the merits of the application the question of jurisdiction raised on brief should be resolved. The common carrier application here was filed under Part II of the Interstate Commerce Act for the issuance of a certificate which, if granted, would authorize applicant to transport general commodities, with exceptions, in interstate or foreign commerce, between various points. Section 206(a) of the Interstate Commerce Act prohibits any [fol. 46] common carrier by motor vehicle from operating in interstate or foreign commerce unless and until it holds a certificate of public convenience and necessity from the Commission. Section 204 of the same act reads, in part, as follows:

"(a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service * * *";

Section 202(a) of the act reads as follows:

"The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission."

Section 10(a) of the Labor Management Relations Act, 1947, usually referred to as the National Labor Relations Act, hereafter called Labor Act, reads in part as follows:

"The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: " . . . "

and under section 10(c) NLRB can issue an order and notice as set forth in appendix C hereto.

Of the 12 stockholders of applicant, Clark is the only one who has sought relief from NLRB, and is the only one who had employees on strike. The other stockholders have not sought relief from NLRB, do not have employees on strike, and certainly in respect of the application herein, as to them, there can be no valid claim that this Commission is injecting itself into the area of labor relations and collective bargaining. Such stockholders believe there is need for additional transportation service based principally on the refusal of certain line-haul carriers to interchange traffic with them. In addition to the testimony of the stockholders themselves, evidence was presented by certain public and shipper witnesses on the question of need for the proposed service. The subject matter here for consideration is an application under section 207(a) of the Interstate Commerce Act and disposition of the proceeding requires, among other things, a determination of whether the service proposed in the application or any portion thereof is or will be required by the present or future public convenience and necessity, and deciding the issues therein by the Commission does not conflict with the decision in *Gardner v. Teamsters Union*, 346 U. S. 485, where it was held that the grievance of a trucking company against picketing by Teamsters (Local 776) was a matter to be decided by NLRB and not by a State tribunal. In that proceeding a State labor board was endeavoring to occupy the same field in which the NLRB is engaged. Where transportation is involved under the Interstate Commerce Act, however, and the duties of common carriers thereunder are involved with respect to the service rendered to the shipping public, it is clear that the Labor Act did not give NLRB exclusive power, particularly where the statute of another regulatory body is violated. *Quaker City Motor P. Co. v. Inter-State Motor Fr. Sys.*, 148 F. Supp. 226. Reference to appendix C hereto (the NLRB order) shows

Teamsters are directed to cease and desist from certain secondary boycott activities against Clark "or any other common carrier by motor vehicle in the area" over which Teamsters Local 554 has jurisdiction. In other words, the protection afforded to Clark by the NLRB order against secondary pressures was extended to other motor carriers in the area which the union was attempting to organize. The fact that NLRB has issued an order in this matter, however, does not preclude the Commission from considering whether additional motor carrier facilities are needed, or other action should be taken under the Interstate Commerce Act because of the interchange difficulties in which certain of applicant's stockholders are involved. The NLRB order directs a union local to cease and desist from certain activities. A Commission order would be directed to an interstate motor carrier or carriers. See *Montgomery Ward & Co. v. Santa Fe Trail Transp. Co.*, 42 M.C.C. 212, discussed elsewhere herein. The examiner concludes that the Commission has jurisdiction properly to consider the transportation matters involved in the instant application.

Before the Commission may grant a certificate of public convenience and necessity under section 207(a), it is necessary to consider, among other things, (1) whether the new operation or service will serve a useful purpose, responsive to a public demand or need; (2) whether this purpose can and will be served as well by existing lines or carriers; and (3) whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203. Any order authorizing such a certificate would have to include a finding to the effect that there was no existing service in operation between the points or over the area applied for or that such service was inadequate or that existing carriers could not furnish and are not satisfactorily furnishing the service required. *Inland Motor Freight v. United States* 60 F. Supp. 520. It is clear from the facts in the instant proceeding that this application is not based on the usual evidence presented in proceedings of this kind. Some protesting unionized motor carriers have refused to interchange traffic with certain stockholders of applicant who are not unionized, and it is

applicant's position that this constitutes an inability or unwillingness on the part of existing carriers to provide adequate and reasonable service to the shipping public in the involved territory. Applicant cites a number of cases in its brief to sustain the claim that the unionized line-haul carriers, including protestants, are unable or unwilling to [fol. 48] provide service, notably *Meier & Pohlmann Furniture Co. v. Gibbons*, 413 F. Supp. 409, 233 F. 2d 296; *Montgomery Ward and Company, Inc. v. Santa Fe Trail Transp. Co.*, *supra*; and *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719.

As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with the stockholders named herein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging traffic with a considerable number of the line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D.M.T., and Merchants. As to Clark, the evidence, shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder has been able to find a motor carrier willing to accept interstate shipments.

Although the shipper evidence relating to interior Nebraska points indicates there have been some delays in transit, principally because shipments have been diverted to carriers other than those designated by the consignees, the shipments have been moving through to destination. There is a question, however, what effect this diversion of traffic which has taken place within Nebraska, has on the issue of public convenience and necessity involved herein.

Although Part II of the act does not specifically grant to shippers the right to designate the routes by which their

property should be transported by motor common carriers, such carriers are charged with the duty under section 216 (b) of the act, to establish, observe and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and it has been held that misrouting is an unreasonable practice under certain conditions. *Eastern Aircraft v. Fred Olson & Son Motor Service Co.*, 47 M.C.C. 363. *Metzner Store Repair Co. v. Rauff*, 47 M.C.C. 151. In the latter case the shipper had specified a certain interchange carrier but the originating carrier had ignored the routing which resulted in shipments being transported over another route at a higher rate. A consignee who exercises control over shipments is a shipper. *United States v. Metropolitan Lbr. Co.*, 254 Fed. 335. Part I of the act, section 15(8), dealing with the railroads, specifically provides that shipper routings must be observed, and section 15(9) gives a cause of action to the rail carrier who suffers a loss of traffic by misrouting. The examiner is informed on protestants' briefs that there is presently pending in Congress a bill which would so amend Part II of the act as to specifically provide, as is now provided in Part I of the act, that a motor carrier subject to Part II must observe and follow shippers' specified routings. If legislation to this effect is passed, such a statute should help correct the misrouting [fol. 49] abuses revealed herein. Presently, however, the carriers injured by misrouting can file a complaint, where it could be determined whether the practices alleged are just and reasonable. In any event, since the Commission has not had an opportunity to pass on these misrouting practices as they affect the particular stockholders involved, it is illogical to assume that the Commission can do nothing by way of a complaint proceeding. If nothing can be done in that manner, then other steps could be taken. In the meantime, however, considering the circumstances involved, and in the absence of specific legislation under Part II regarding misrouting, an extensive grant of operating rights between Omaha and Lincoln, on the one hand, and, on the other, Chicago, Denver, St. Louis, St. Joseph, Minneapolis and Des Moines would not be justified,

particularly since the diversions or misroutings have taken place principally within Nebraska.

In regard to the shipper evidence relating to Lincoln, the facts show that the existing carriers generally are giving good service to the involved retail stores; and there is no substantial basis to authorize additional motor carrier service to or from that point.

As to Omaha, the evidence shows, with respect to the air-conditioning contractor, that Bos has been making deliveries direct to consignee's place of business since about October 1, 1956, and that picketing at the contractor's place of business had ceased. Similarly, after January 28, 1957, the line-haul carriers resumed pickup and delivery service at the manufacturer of frames for upholstered furniture when the Upholsters' Union withdrew its charges of unfair labor practices. Thus, as to these business establishments no need has been shown for the additional service proposed.

In regard to the warehouse operator, the evidence shows its premises were still picketed by Teamsters. In the *Meier & Pohlmann* case, *supra*, a furniture company in St. Louis was involved in a strike of its workers which belonged to a union certified by NLRB. The strikers set up a picket line. Thereafter, pickup and delivery service by carriers practically ceased. The motor carrier defendants there claimed that they were excused from furnishing pickup and delivery service by their impracticable delivery tariff. This tariff in substance stated that there was nothing therein which would require the carrier to perform pickup or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of "any riot, strike, picketing or other labor disturbance." The Court pointed out that it was not concerned with the question of the validity of the tariff but only with the construction and interpretation thereof. After an appraisal of the evidence, the court concluded that the defendant carriers were excused from performing the pickup and delivery service to which plaintiff therein claimed it was entitled. In making this determination the court stated: "Because of the foregoing conclusion we do not reach the question of whether a proper construction of the impracticable operation tariff would excuse

performance by the carriers if only peaceful picketing had been present or had been involved." The facts in that case had indicated there was some violence and peace disturbance [fol. 50] during the existence of the picketing. The action therein included a request for a permanent injunction and it was indicated that under the Norris La Guardia Act it was necessary to show, among other things, that unlawful acts had been threatened and would be committed unless restrained or that such acts had been committed and would be continued unless restrained.

In the instant proceeding while the facts indicate that the warehouse operator in Omaha has been the subject of organizational or recognition picketing and there has been no strike of its employees, it is apparent that a labor dispute is in progress in which Teamsters seek to have the employer pay established wage rates. In *Garner v. Teamsters, supra*, where Teamsters had resorted to organizational picketing to induce a storage and transfer company in Pennsylvania to join the union and "gain union wages, hours, and working conditions", the Supreme Court concluded that Teamsters were subject to being summoned before the NLRB to justify their conduct, and that on the basis of the allegations the Pennsylvania storage company could have presented its grievance to the NLRB. In that case picketing was orderly and peaceful, but drivers for other carriers refused to cross the picket line. A motor common carrier of freight, in interstate or foreign commerce, has certain duties and responsibilities toward the public. It is under a duty to shippers to furnish service under its tariffs to the limit of its capacity to do so upon reasonable demand. *Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co.*, 215 F. 2d 126. Whether the line-haul carriers in the instant proceeding are violating their common carrier duty in not performing pickup and delivery service is properly the subject of a complaint proceeding. In *Montgomery Ward Co., Inc. v. Santa Fe Trail Transp. Co., supra*, a complaint proceeding, it was found that refusal by certain motor carriers to make pickups and deliveries was unlawful and in violation of section 216 of the act. In that proceeding, however, picketing was resorted to for the sole purpose of forcing a shipper to patronize a particular carrier.

Montgomery Ward in Kansas City had terminated its contract with a local transfer company and entered into a new one with Railway Express for transportation of local mail and miscellaneous freight. The drivers of the express company were members of one union and the drivers of the transfer company were members of Teamsters who established a picket line simply because the transfer company lost its contract. The warehouse operator in the instant proceeding has taken no action before this Commission in the way of a complaint, and evidently has not requested any action by NLRB. In addition to these regulatory agencies, it has recourse to the courts for an injunction. See *Quaker City Motor P. Co. v. Inter-State Motor Fr. Sys.*, *supra*. Its traffic is getting through to its warehouses by railroad, and it also receives some direct delivery service by motor carriers of specific commodities. In the circumstances, the evidence with respect to proposed service to and from Omaha does not justify any grant of additional authority.

As previously indicated, there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that the real parties in interest who are aggrieved by this practice should file a complaint with this Commission under Part II of the [fol. 51] act. In any event, since no complaint has been filed by any of applicant's stockholders with this agency, the Commission has not had an opportunity to test the effectiveness of that procedure. Certainly it cannot be assumed that the Commission's procedure thereunder would be ineffectual. Although applicant cites the *Planters Nut* case, *supra*, to sustain its argument that additional motor carrier authority is needed to correct the situation, it should be borne in mind that that was a complaint case and the Commission issued an order requiring certain specified carriers to cease and desist from certain interchange practices found to be unlawful. In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and, if a certificate is granted on the evidence herein those protesting carriers who have been continuing to interchange normally would be injured along

with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions of the routes involved and the shipments are moving through to destinations.

The examiner concludes that the application should be denied. In view of this conclusion, it is not deemed necessary to discuss the question of applicant's fitness and ability to conduct the proposed operations. Also, in view of this conclusion the examiner does not deem it necessary to discuss the necessity of the involved stockholders seeking approval under section 5 of the act to control applicant through ownership of stock or otherwise. Furthermore, since denial of the application is recommended it is not necessary to consider what effect a grant of operating rights would have on certain of applicant's stockholders who operate under the second proviso of section 206a of the act and are presently permitted to handle interstate traffic solely within Nebraska without a certificate from this Commission.

FINDINGS

The examiner finds that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Donald R. Sutherland, Examiner.

(Signature) Donald R. Sutherland

APPENDIX A

NEBRASKA SHORT LINE CARRIERS, INC.

DESCRIPTION OF AUTHORITY SOUGHT

Authority to operate as a common carrier, over regular routes, transporting: General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30 to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66; thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph, Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

[fol. 53]

No. MC-116067

APPENDIX B

APPLICANT'S COMMON CARRIER TEMPORARY
AUTHORITY IN No. MC-116067 (Sub-No. 1) TA

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over regular routes,

Between Omaha, Nebr., and Chicago, Ill., with interline privilege at Omaha:

- From Omaha over U. S. Highway 6 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route.

Service is not authorized at intermediate points.

Between Omaha, Nebr., and St. Louis, Mo., with interline privilege at Omaha:

From Omaha over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, and thence over U. S. Highway 40 to St. Louis, and return over the same route.

Service is authorized at the intermediate point of Kansas City, Mo., except on shipments moving to or from St. Louis.

APPENDIX C

COPY OF NATIONAL LABOR RELATIONS BOARD
ORDER AND NOTICE

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 554, AFL-CIO, its officers, representatives, agent, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers, where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, or (2) to force or require Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, to recognize or bargain with Respondent as the collective bargaining representative of their employees, respectively, unless and until the Respondent has been certified as the representative of such employees in accordance with the provisions of Section 9 of the National Labor Relations Act;

(b) Engaging in any or all of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Forthwith notify all its members who are employed by employers other than Clark Bros. Transfer Company and Coffey's Transfer Company, and all employees of said employers who are represented by it, that it has no objection to their transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company. Such notice shall be in addition to that conveyed by the posting of the notices specified in paragraph (b), below;

(b) Post at its business office at Omaha, Nebr., copies of the notice attached hereto as an Appendix.¹¹

[c]l. 55]

APPENDIX C (continued)

NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, GENERAL DRIVERS AND HELPERS LOCAL 554, AFL-CIO

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process,

¹¹ In the event that this Order is enforced by a decree of a United States Court of Appeals, this notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER," the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which we have jurisdiction, or (2) to force or require Clark Bros. Transfer Company or Coffey's Transfer Company, or any common carrier by motor vehicle in the area over which we have jurisdiction to recognize or bargain with the undersigned union as the representative of their employees unless and until certified by the National Labor Relations Board.

WE WILL NOT engage in any of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

WE HAVE NO OBJECTION to the action of the employees of any employer other than Clark Bros. Transfer Company and Coffey's Transfer Company in transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company; and we will give specific notice to that effect to all our members who are employed by any such employer and to all other employees of such employers who are represented by us.

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, GENERAL DRIVERS AND HELP-
ERS LOCAL NO. 554, AFL-CIO.**

By
(Representative) (Title)

Dated

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 56]

APPENDIX C (continued)

Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent's official representative shall also sign copies of the said notice which the Regional Director shall submit for posting, the employers willing, at the premises of Clark Bros. Transfer Company and Coffey's Transfer Company (if it resumes operations), and at the Omaha premises of the other employers named in footnote 38 of the Intermediate Report;¹²

(c) Notify the Regional Director for the Seventeenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., December 26, 1956.

Boyd Leedom, Chairman

Philip Ray Rodgers, Member

Stephen S. Bean; Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

¹² There shall be inserted in the caption of said notices, following the name of the Respondent, the words "AND TO ALL EMPLOYEES OF" followed by the name of the employer at whose premises the said notice is to be posted.

[fol. 57]

Recommended by Donald R. Sutherland,
Examiner

(Signature) Donald R. Sutherland

ORDER

At a Session of the INTERSTATE COMMERCE COM-
MISSION, Division 1, held at its office in Washington,
D. C., on the day of A. D. 1957.

No. MC-116067

NEBRASKA SHORT LINE CARRIERS, INC.
COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

HAROLD D. McCoy,
Secretary

(SEAL)

[fol. 58]

EXHIBIT "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served Aug 8-1957

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 35 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 25 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-116067 (Sub-No. 2)

NEBRASKA SHORT LINE CARRIERS, INC.
COMMON CARRIER APPLICATION

Decided _____

Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of general commodities, with certain exceptions, between Omaha, Nebr., on the one hand, and numerous States, on the other. Application denied.

J. Max Harding and Robert A. Nelson for applicant.

Bates Block and J. E. Allen for three neutral interveners.

David D. Weinberg and Herbert S. Dolgoff for General Drivers and Helpers Union, Local 554, of Omaha, Nebr.

Truman A. Stockton, Jr., Carll V. Eretsinger, Alvin J. Meiklejohn, Jr., William P. Higgins, John J. Burchell, Hugh T. Matthews, Charles Y. DuPont, Ferdinand Born, James N. Clay, III, Richard B. Allen, Kenneth A. Helms, G. M. Brewer, C. A. Ross, David Axelrod, Carl L. Steiner, Robert H. Levy, P. G. Whitmore, Robert J. Bernard, Ed White, J. B. Reeves, and Walter F. Jones, Jr., for protestants and interveners in opposition to the application.

[fol. 59]

REPORT AND ORDER

RECOMMENDED BY

MICHAEL B. DRISCOLL, EXAMINER

Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., by application filed January 10, 1957, as amended, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities (except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, those requiring special equipment, and stone, cut or uncut, finished or in the rough), between Omaha, Nebr., on the one hand, and, on the other, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

Under appropriate orders, the application was heard at Omaha, April 4-5, 9-12, and 15-17, 1957. The application is opposed by numerous rail carriers, by a relatively large number of motor carriers, and by General Drivers and Helpers Union, Local 554, of Omaha, affiliated to International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers, of America, A. F. L.-C. I. O.

Certain motor carriers are referred to herein by abbreviated names. Those names and the corresponding full names will be shown below. Unless otherwise shown herein, all those are motor common carriers of general commodity [fol. 60] ties, with more or less standard exceptions, and all operate over regular routes.

Abbreviated Name:	Name of Carrier:
Romans	John Jack Romans
Clark	Fred L. and Walter F. Clark
Abler	Abler Transfer, Inc.
Burlington Truck	Burlington Truck Lines
Santa Fe Trail	The Santa Fe Trail Transportation Company
McKay	C. C. and Earl R. McKay
Lyon	Royal F. Lyon

All rulings on appearances, motions, amendments, and objections have been reviewed and further considered, and they are hereby affirmed.

All evidence has been studied and weighed. No one would be helped and no good nor useful regulatory purpose would be served by writing down all that voluminous evidence. Instead of all that, the intermediate or ultimate facts will be stated in most instances; and, from those facts, first preliminary and then ultimate conclusions will be drawn. For reference purposes, numbered divisions will be used.

1.—Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through or to that centrally located city.

2.—All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union. Those Teamster contracts almost invariably contain the so-called hot cargo provisions, which read:

"It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a [fol. 61] Union or refuse to handle unfair goods. Nor

shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs or lockouts exist.

The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement.

The Union shall give the Employer notice of all strikes and/or the intent of the Union to call a strike of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the possession of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

[fol. 62] The insistence by any Employer that his employee handle unfair goods or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any need of the Union to go through the grievance procedure herein."

3.—Differing from those larger trunkline carriers, are a number of small, or relatively small, eastern Nebraska motor carriers, which are not unionized, and which use Omaha as a principal or important interchange point with the larger unionized carriers. Some may also use Grand Island or Lincoln, Nebr., Sioux City, Iowa, or possibly other places as points of interchange, but all or practically all use, and logically must use, Omaha for much or most of their jointline traffic.

^B 4.—As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in those eastern Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Abler, were not approached until early 1956. It is obvious from this record that the Union was not very successful; that, in most cases the employees did not respond; and that in every instance the carriers were more than reluctant to accept unionization.

5.—The Clark situation is somewhat different from that of other eastern Nebraska carriers, so that it will later be considered separately.

6.—Having no satisfactory success in the eastern Nebraska field, the Union apparently and very probably started at the other end and began to work through the unionized [fol. 63] carriers and put the pressure indirectly on the eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections

at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln, and Grand Island.

7.—While some Omaha trunkline carriers did not freely admit that their interchange practices after May 1956, had been materially different from earlier practices, some others freely admitted they had not been able to interchange with eastern Nebraska carriers in the same free and open way they interchanged prior to May 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May 1956, a deterioration in interchange relationships and a rise in interchange difficulties.

8.—The conclusions of Paragraph 7 are heavily confirmed by the testimony and exhibits of a number of the eastern Nebraska carriers. Example after example was recited with convincing sincerity, and surely no one could seriously contend that the firm declarations of these carriers were not well founded upon actual experience. The conclusions of Paragraph 7 must therefore be accepted as correct and conservative.

9.—It should be stated that the attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that [fol. 64] some carriers, like Burlington Truck and Santa Fe Trail, accepted almost all traffic offered. But even those carriers did not maintain the same free and open interchange practices in effect before May 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not provide normally acceptable service for much or most of the traffic which these eastern Nebraska carriers would normally have handled.

10.—The record shows beyond any reasonable doubt that, so far as those eastern carriers were involved, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May 1956. And there could be no reasonable doubt that, as a direct result, those Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers. A few examples of the effects will suffice. In 1955, about 20 percent of McKay's traffic was interstate, while now probably not over 10 percent is interstate. Abler's gross revenue fell about \$70,000 in 1956, and its interstate traffic fell from 60 percent of the total traffic to 40 percent. Incidentally, Abler used to have an appreciable amount of interstate traffic through Sioux City, Iowa, but has given up that gateway temporarily, assertedly because of Union pressure. Romans' February 1957, gross revenue was \$3,000 less than its February 1956, revenue. Lyon's total traffic [fol. 65] used to include from 18 to 20 percent interstate, but now it is almost wholly intrastate.

11.—Faced with that problem, some of the eastern Nebraska carriers got together and formed applicant corporation. No point would be made by reciting the preliminary or intermediate steps in that transaction. The principal theory of the corporation is that, as a carrier based at Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond.

12.—As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation.

[fol. 66] 13.—Applicant was originally organized as a Nebraska Corporation June 14, 1956, and was reorganized January 7, 1957. Its principal office is at Lincoln. Its au-

thorized stock consists of 1,000 shares of common and 5,000 shares of preferred stock, all shares having a par value of \$100 each. Outstanding stock consists of one share of preferred and 375.5 shares of common stock. With a minor exception of a half share of common, all outstanding stock is held by eastern Nebraska carriers, no one of which holds over 51.5 shares. There are now 12 stockholders. There are three officers and those, with two other persons, form the present board of directors. All those officers and directors are eastern Nebraska carriers or officials of such carriers.

14. The corporation was formed for the purpose of operating as a motor common carrier of general commodities, with exceptions. Applicant first sought, and obtained, certain temporary authority. That authority was granted in No. MC-116067 (Sub-No. 1) by order of the Commission, division 1, entered December 4, 1956. A joint petition in opposition thereto was filed by four motor carriers, and that petition was denied by order of the Commission, entered February 25, 1957. In the meanwhile, compliance by applicant having been made, the Commission, by telegram of January 3, 1957, authorized applicant to operate under that authority until June 30, 1957. That authority covers general commodities, with exceptions, over specified routes; between Omaha and Chicago, with interline service at Omaha and with no service at intermediate points, and between Omaha and St. Louis, with interline service at Omaha and with service at the intermediate point of [fol. 67] Kansas City, Mo., except that the Kansas City authorization does not include shipments moving to or from St. Louis. While operations under that authority could have been commenced January 3, 1957, they were not commenced until shortly after March 1, 1957. The explanation of that delay is that, for reasons not disclosed, applicant's counsel advised against operations prior to that time. While there was no showing of traffic volume or number of trips, the record as a whole shows rather conclusively that operations under that authority have been at least rather substantial.

15. Under an application filed June 22, 1956, in No. MC-116067, applicant is seeking a certificate for general commodities, with exceptions, over a number of specified routes, principally between Denver, Colo., and Chicago, Ill., via Omaha, with service at all intermediate points. Hearing on that application was closed February 25, 1957. It should be noted that, as to points and commodities, the instant application would include everything in that application. The only material difference would be that this is for irregular route authority while that is for regular route authority.

16. Applicant has employed an able and experienced general manager, and it is more or less leaving it up to him to plan, institute, and maintain operations and services under this relatively broad application. No detailed plan was disclosed. Applicant asserts it would be a simple matter to provide the proposed service. As to possible [fol. 68] backhaul traffic, it was admitted that this would be something of a problem. One statement was that, if service were asked for a shipment from a distant outlying point to Omaha, and attempt would be made to solicit a load from Omaha to that outlying point or to some point near it. The appearances and indications are that some reliance would be placed on exempt commodities for backhaul. A statement on that subject was made to the effect that, if a load were moved from Omaha to Santa Fe, N. Mex., for example, it might be necessary to move the unloaded truck to a Rio Grande Valley point or to southern California for a return load. While no finding need be made on this subject, it seems to be a fair statement to say that an operation based on Omaha and covering so many States would, particularly as to less-than-truckload traffic, present a lot of difficult operational and service problems.

17. Although it states it might buy equipment if that were later deemed necessary, applicant has so far used only leased equipment. All appearances are that it would continue the use of leased equipment into the indefinite future. A number of eastern Nebraska carriers have declared their readiness and willingness to lease certain other

equipment to applicant. Equipment is also available for leasing from other sources.

18. Applicant now has terminal facilities at Omaha and Chicago and it apparently has such facilities at Kansas City, Mo. Attempts are being made to obtain such facilities at St. Louis, Mo. Not much was said about future terminals.

[fol. 69] 19. Applicant's present employees consist of a general manager and an office employee at Omaha and a solicitor at Kansas City. Accounts are looked after on a part-time basis by a certified public accountant. There are no drivers carried on the rolls, because the lessors of equipment either drive their leased equipment or provide a driver with their equipment.

20. Applicant submitted a balance sheet as of March 31, 1957. That shows total assets of \$29,340.46 and current assets of \$26,213.06. Current liabilities were \$3,514.90. The capital stock account was \$37,550, and the earning deficit was \$11,724.44. That left a net worth of \$25,825.56. An operating statement for the period from June 14, 1956, through March 31, 1957, shows revenue of \$5,220.06 and expenses of \$16,944.50 and a deficit of \$11,724.44. Applicant explains that operations were not started until about March 1, 1957, and that expenses were sharply increased by expenditures for organizing the corporation and preparing it for operations. It contends that, with the authority sought, it could wipe out the deficit and get on a profitable basis. It also explains that additional funds could be raised by selling more stock.

21. A number of possible technical difficulties were pointed out at the hearing. One theory was that, since applicant's stockholders are owners or part owners of other motor carriers, section 5 of the act might be involved. Another theory advances was that some stockholder carriers operate under registration of Nebraska certificates [fol. 70] and that their stock holdings might have the effect of placing themselves in position where they would have to choose between their registration right and their right

to hold stock in applicant corporation. Still another difficulty was argued from the fact that, if successful under both pending applications, applicant would have to the extent of duplication both regular and irregular route authority. Applicant declares that, if found necessary, section 5 applications would be filed. These asserted difficulties are technical in nature. They should not be considered as reasons for denying this application. If applicant is otherwise found fit and able and if it is found that public convenience and necessity require any part of this proposed operation, these technical matters should then be studied and applicant should then be given an opportunity to overcome any obstacles that may arise from those matters.

22. The principal and most important evidence in support of this application comes from representatives of the 12 stockholders of applicant, which are eastern Nebraska carriers. From an earlier study of that evidence, along with all other evidence, it has already been concluded that, as a result of Union pressure on trunkline carriers, all those 12 carriers suffered some inconvenience and some damage from the action, inaction, or failure of those trunkline carriers in their interchange practices with those eastern Nebraska carriers.

[fol. 71] 23. When the evidence of those 12 carrier representatives is carefully and fairly examined, it must be said that not one of them complained of interchange conditions or of connecting line services in existence prior to the rise of Union pressure in early 1956. In other words, not one of them showed or even alleged that when conditions were normal they then had a need for a new or additional connecting line at Omaha. All their complaints are, in fact, bottomed on the rise of Union pressure. On the contrary, some of the leading figures in this enterprise admitted that, up to May 1956, everything in the way of interchange practices and connecting line services had been all right. For example, Lyon, the treasurer and a director of applicant, admitted his business was normal before February 8, 1956. Leonard Abler, a director, admitted his business had been normal up to May 1956. Romans, president and director of applicant and the principal

carrier witness therefor, specifically admitted that his connecting line arrangements and practices had been satisfactory up to May 7, 1956. The only logical, reasonable, and fair conclusion from all that evidence is that, so far as those carriers are of concern, everything had been all right up to early 1956 and would be all right again if the interchange practices and carrier services of trunkline carriers went back to their normal standards maintained before these Union difficulties arose.

24. As already noted, the Clark situation is somewhat different from that of other eastern Nebraska carriers. Clark started its business in 1938, under authority obtained from the Nebraska regulatory agency, and that authority [fol. 72] was subsequently registered with this Commission. As a result of a proceeding before this Commission, a certificate, in lieu of registration, was issued to Clark on April 4, 1957. Clark's system of routes lies in northeastern Nebraska. Those routes extend from Lincoln, Omaha, and South Sioux City, Nebr., to such Nebraska points as Fremont, Columbus, Grant Island, Norfolk, Butte, and Ainsworth. It has terminals at Omaha and Norfolk. Like the other eastern Nebraska carriers, its difficulties arose from labor causes, but they arose earlier. After some labor negotiations, which need not be recited, four driver employees left the Clark organization at Omaha on September 14, 1955, and picketing of the Clark Omaha terminal immediately followed. As a result, interchange business with Omaha trunkline carriers fell to almost nothing. Clark's attorneys soon thereafter took that problem up with National Labor Relations Board. There were several resulting proceedings before that Board and before Federal Courts. Despite all that, these matters have never been completely settled, at least to the satisfaction of Clark. A contempt citation is still pending before the Court, and the Clark Omaha terminal is still being picketed. The interchange situation was rather acute until about July 30, 1956, when some improvement began to develop. Further improvement developed after November 1956. But the situation was never completely normal, not even up to the opening day of this hearing. There would be no point in detailing all the legal steps taken by Clark or on behalf of Clark,

because those controversies could not be fairly nor intelligently resolved here. The fact here is that the troubles of Clark arose from labor relations, and that the damage to Clark has been very severe. Its gross revenue fell from \$262,000 in 1954 to about \$217,000 in 1956, and its interstate traffic fell from 30 percent of its total traffic in 1954 [fol. 73] to about four percent in 1956. But here again there is no showing nor even an allegation that the interchange practices or services of Omaha trunkline carriers were inadequate or even unsatisfactory prior to September 14, 1955. A logical, reasonable, and fair conclusion is that, if the labor difficulties complained of had never arisen, there would have been no complaint and no just basis for a complaint against Clark's connecting carriers.

25.—In fairness to those eastern Nebraska carriers, it should be said that a few of them advanced the idea that, even if all labor problems were resolved and even if all truckline interchange practices went back to normal, there could be no assurance that labor problems might not arise again. While there is little history of past labor relations, the Abler witness declared his company had experienced similar difficulties three times before. In other words, the theory is that applicant could be used as a safeguard against the effects of possible labor difficulties in the future.

26.—As further support for this application, applicant presented representatives of a number of possible users of the proposed service. Three of those possible users have been experiencing labor difficulties right at their own places of business. For that reason, their problems will be considered first.

27.—Two related companies, using the same Omaha plant, will be referred to here as the Chardon Companies. Together, they manufacture a number of furniture items. Sales are made at numerous points in 29 States, most of which are included in this application. Raw materials and supplies are received from one to several points each in 23 States, all of which are included in this application. The yearly volume averages 3 million pounds out and 3.5 million pounds in. Most of the outbound and much of the

[fol. 74] inbound traffic is controlled by the Chardon Companies. Truck service is used for 75 percent of the outbound and for 40 to 50 percent of the inbound traffic. It is admitted that service was all right until October 18, 1956, when a relatively small number of its 70 to 75 employees failed to show up and apparently went out on a strike. Shortly afterward, a picket line was formed around the plant. There were a few incidents of roughness, such as air being let out of workers' automobile tires and a flare being thrown through the window of the plant office. The police department could not determine whether the flare had been lighted. It should be noted that this labor difficulty was with the upholsters' union. As a result of that difficulty, the Chardon Companies encountered trouble in getting trucking service for its in and out freight. In the meanwhile, the labor trouble has disappeared, and normal service has been available since January 28, 1957. There is no showing nor contention that the service normally available is inadequate or would be for the future. The Chardon Companies have been using applicant's temporary service, along with the services of other carriers. In support of this application, they say that it would be a benefit to them to have many lines serving their plant and that, in case of more labor trouble, applicant's service would be very useful.

28.—Ford Storage & Moving Company and Ford Brothers Van and Storage Company are family corporations [fol. 75], controlled by the same persons. Their problems will be considered together. They own two warehouses at Omaha and one warehouse at Council Bluffs, Iowa. Their problems exist only at Omaha. They own some trucks and do local cartage work for the public, in and around Omaha. One principle function of these companies is to provide storage for all classes of merchandise, except such items as require cold storage. In connection with that important part of their business, they normally have a heavy movement of freight both in and out. From 1952 through 1956, the inbound volume ranged from the equivalent of 575 to 779 carloads. Indications are that the outbound volume is relatively large but substantially smaller than the inbound volume. Representative origins

of inbound traffic are Chicago, Ill. Durham, N. C., Cincinnati, Ohio, Sioux Falls, S. Dak., and Beloit, Wis. Destinations of outbound traffic are principally in Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado. On inbound traffic, rail service has always been heavily used, but there has been a growing tendency toward truck service. By early 1956, about 60 percent of the volume was coming in by truck. On outbound traffic, truck service is even more extensively used. Normally, the Ford Companies control outbound and the shippers control inbound traffic. These companies have never been unionized; they do not wish to be unionized; and they have never taken their problems up with National Labor Relations Board. Everything in transportation was all right here until early 1956, when the Teamsters Union [fol. 76] began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of this hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses and some apparently would not do business with these companies. For about a month, during the early days of the picket line, even the train crews declined to serve the warehouses. In that state of emergency, the Ford Companies made arrangements to rely more extensively upon rail service, particularly into Omaha. That is not an ideal solution, and it is only a partial solution of the problem. In addition to the inconvenience and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All those transportation troubles came directly or indirectly from labor difficulties. The Ford Companies admit that their service situation prior to May 1956 was adequate and satisfactory. They support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored, they would still favor applicant's service, their theory of

support being that service might be interrupted again in the future.

[fol. 77] 29.—The Broyhill Company has a plant at Dakota City, Nebr., six miles south of Sioux City, Iowa, where it manufactures farm equipment. It sells at numerous points in 43 States, including most of those included in this application. Its gross sales ran between seven and eight hundred thousand in 1956, and greater sales are anticipated in 1957. Raw materials come from a number of points spread throughout 20 States. Rail service is used rather extensively on the bulkier inbound commodities but far less extensively on the outbound traffic. About 60 percent of the out traffic moves in truckload lots. About 80 percent of the outbound traffic is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of a steel workers union went on strike and set up a picket line. Negotiations between Broyhill and the Union have been going on since sometime before the strike was called. As a result of the picket line, there has been no pickup nor delivery service at the plant since the line appeared. Broyhill admits that it had no transportation problems prior to March 14, 1957, and that its service had been generally satisfactory. It nevertheless supports this application, upon the theory that there could be no guarantee that it would not have another strike.

30.—Howard Huff has his place of business at Ord, Nebr., and sells farm machinery in Valley County, Nebr. His principle origin is Hopkins, Minn., but he also receives machines from Chicago, Rock Island, and Moline, Ill. Parts [fol. 78] are received from those points, as well as from Kansas City, Mo. Business has been below normal for two years, but in normal times he receives from two to three full loads of machinery yearly and receives parts about twice monthly. He pays freight charges and ordinarily designates routing, although he admits that shippers sometimes do not follow his directions. He complains that, since May 1956, he has had some transportation difficulties. One complaint is that delays have occurred; another is that, contrary to his preference, rail service has been used from Omaha to Ord; and another is that, because of misrouting,

excess charges have been applied. He prefers that all his traffic be moved from Omaha to Ord by Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

31.—Richard Rowhal, of Ord, sells and erects Quonsit buildings in nine Nebraska counties centered on Ord. His principle traffic comes from Detroit, and about 95 percent of it is normally handled by truck carriers. He pays freight charges and ordinarily designates routing beyond Omaha; and his preference is for delivery by Romans. He complains of delays, of the fact that excess charges have been applied in some instances, and of the fact that, contrary to his wishes, deliveries have been made by rail carriers or by motor carriers other than Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

[fol. 79] 30.—Wheeler Lumber, Bridge & Supply Company has a warehouse at Norfolk, Nebr. It receives raw materials from a number of points in the Midwest and East and ships manufactured products, such as snow fences and corn cribs, largely to Iowa, to some extent to Kansas, Wyoming, and South Dakota, and occasionally to Minnesota. With the exception of South Dakota, practically all outbound traffic goes by truck, and from 75 to 80 percent of the inbound traffic moves by truck. Routing is controlled by Wheeler. On inbound traffic, the practice apparently has been to let shippers select originating carriers but to instruct them to route care of Clark at Omaha. Clark and Abler have been the principal outbound carriers; but from five to six other Norfolk carriers have also been used to some extent. During most of 1955, routing preferences were followed and service was generally satisfactory. Apparently because of labor problems of eastern Nebraska carriers, particularly those of Clark, service has not been satisfactory since late 1955. Complaint was made of delays and of the fact that some shipments came by rail instead of by truck. It was admitted that at least one shipper declined to follow routings prescribed by Wheeler. It

supports this application upon the theory that service by applicant in and out of Omaha would enable it to follow its preference in using the Clark service between Omaha and Norfolk.

31.—Evidence in opposition to the application was submitted by ten rail carriers, three of which serve Omaha. That evidence tends to show that rail carriers offer and provide standard rail service from and to Omaha in connection with all classes of traffic moving from or to [fol. 80] principal points throughout the territory of this application. Rail carriers are normally unionized throughout their various classes of employees.

32.—About 29 motor common carriers submitted evidence in opposition to the application. All these are authorized to transport general commodities, with exceptions, and to operate principally or entirely over regular routes. At least 11 of those are authorized to serve Omaha. Those 11 include most of the principal motor common carriers at Omaha, such as Watson Bros. Transportation Co., Inc., Union Freightways, Navajo Freight Lines, Inc., The Santa Fe Trail Transportation Company, Prucka Transportation, Inc., and Independent Truckers, Inc. Most of the carriers serving Omaha have terminals there, and many of those are large carriers, operating large, or relatively large, fleets of equipment. Most of those carriers admit some difficulties in handling jointline freight with eastern Nebraska carriers, but all of them insist that, if conditions were normal, they could and would provide good interchange service and good highway service. All of them declare that, except for conditions not due to their initiative nor desire, they have been ready, able, and willing to provide service for all traffic offered by shippers or connecting carriers. For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers. It was [fol. 81] explained that, where picket lines exist, there

might still be difficulties in interchanging traffic in the usual and normal methods of interchange. All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline carriers will strive to restore to normal their carrier relationships and interchange practices at Omaha.

33.—All the evidence submitted by carriers in opposition has been studied and weighed. The evidence for rail carriers shows that standard, normal rail service is available at Omaha and that rail carriers are ready and able to provide service for all traffic offered. While no serious attempts were made to show that rail service, as such, had been or would be inadequate, the trend of the testimony is to the effect that a sufficiency of motor service is and would be needed from and to Omaha. Actually, the problem here is not based on rail service but is based only on motor service. Rail service can therefore be dismissed from the problem.

34.—The trunkline motor carriers, as a whole, have always been willing to provide service from and to Omaha, for traffic originating at or destined to Omaha, as well as for traffic received from or delivered to connecting lines at Omaha. They have also had the ability to provide a sufficiency of service of a quantity and quality, which, if freely and fully available, could have and would have met all the reasonable and well-founded transportation requirements for motor service asserted on this record. Were it now for the effects of union pressure upon these carriers, there [fol. 82] would have been no material problem to complain of and there would be no problem here to consider. No matter how this problem is viewed, it has but one origin—labor pressure. If the labor effects were removed from this problem, no problem of any appreciable substance would remain. In that situation, the question is whether a grant of authority should be made to meet and overcome the effects of labor difficulties.

35.—In these circumstances, the conclusion is that the application should be entirely denied. Most of the Omaha trunkline carriers have heavy investments in equipment

and facilities and have large or relatively large employment rolls. Everybody knows that labor unions are not like Boy Scout organizations and that labor strikes or other labor difficulties can have seriously damaging or even disastrous effects upon a business and its employees. For example, one carrier in opposition has had a labor problem at its Minneapolis, Minn., terminal since April 21, 1952, and has not provided any direct service at that important terminal point since September 15, 1952. With those important factors influencing their judgment, and in view of the labor contracts they had signed, it was not illogical nor unbusinesslike to more or less go along with their union or at least not to get in trouble with it. As a matter of fact, many of the carriers were advised by a labor affairs consultant. There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just about what any reasonable and prudent business man would have done in the face of these union activities.

[fol. 83] 36.—Even though one of the stated objects of the national transportation policy is to encourage fair wages and equitable working conditions, the Commission has been given no power to settle labor problems or even to influence them.

37.—It is obvious that it would be unwise to attempt to use the certificate provisions of the act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union. In fact, that action could not be justified by anything in the act.

38.—The trunkline carriers have union contracts. The eastern Nebraska carriers are for the most part small or relatively small business men. Most of them are obviously opposed to unionization of their business. This Commission has no authority nor means of solving that problem. If, as some eastern Nebraska carriers imply, the National Labor Relations Board does not offer a solution to that problem, then it obviously is a problem that only the Legislative Branch of the Federal Government could solve. Certainly, this Commission is in no position to solve it.

39.—The principle recommended for application to this particular proceeding can be stated in this way: To the extent that the interchange and service defects and inadequacies complained of have been actually due to labor difficulties, and if, as to those difficulties, the carriers immediately affected have exercised such diligence and prudence as would normally be exercised by a business man faced with such difficulties, then, and to that extent, their services and interchange practices will not be considered inadequate for public convenience and necessity purposes.

[fol. 84] 40.—When that principle is applied here, it must be found that, so far as labor difficulties have affected interchange practices and services, the trunkline carriers are entitled to a protective finding.

41.—When that conclusion is made, there is nothing much left upon which a finding of public necessity could be based. Denial of the application must therefore be recommended.

42.—In view of that conclusion, there is no necessity of recommending a finding on the subjects of fitness and ability.

43.—Nothing said here is intended in any way to affect the application pending for authority over regular routes.

44.—The examiner finds that applicant herein has not proved that public convenience and necessity require the operation for which authority is sought and that consequently this application should be denied.

In view of the findings, the examiner recommends that the appended order be entered.

By Michael B. Driscoll, Examiner.

(Signature) MICHAEL B. DRISCOLL.

[fol. 85]

Recommended by Michael B. Driscoll,
Examiner

(Signature) MICHAEL B. DRISCOLL.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1957.

No. MC-116067 (Sub-No. 2)

NEBRASKA SHORT LINE CARRIERS, INC.
COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 86]

EXHIBIT "C" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-116067¹NEBRASKA SHORT LINE CARRIERS, INC.,
COMMON CARRIER APPLICATION

Decided June 1, 1959.

DATE OF SERVICE
JUN 4—1959

1. In No. MC-116067, public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of general commodities, with exceptions, over regular routes extending between Omaha, Nebr., on the one hand, and, on the other, Chicago, Ill., and Kansas City and St. Louis, Mo., restricted to traffic originating at or destined to points in Nebraska. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.
2. In No. MC-116067 (Sub-No. 2), public convenience and necessity found not shown to require operation by applicant as proposed, and application denied.

J. Max Harding, Irvin C. Levin, W. F. Manasil, R. E. Powell, and Robert A. Nelson for applicant.

F. J. Saccomanno for intervener in support of No. MC-116067.

David D. Weinberg and Herbert S. Dolgoff for intervener in opposition in both proceedings.

¹ This report also embraces No. MC-116067 (Sub-No. 2), Nebraska Short Line Carriers, Inc., Extension—32 States (formerly entitled Nebraska Short Line Carriers, Inc., Common Carrier Application). The title has been changed to avoid confusion.

J. R. Rose, William P. Higgins, Earl J. Brooks, Truman A. Stockton, Jr., Homer E. Bradshaw, J. B. Reeves, Guy C. Chambers, Jack Goodman, S. F. Pavelec, G. M. Brewer, Robert H. Lery, Ralph B. Lockwood, Robert F. Munsell, David Axelrod, Ed White, Carll V. Kretsinger, Alvin J. Meiklejohn, Jr., John J. Burchell, Hugh T. Matthews, Charles Y. DuPont, Ferdinand Born, James N. Clay, III, Richard B. Allen, Bates Block, J. E. Allen, Kenneth A. Helms, C. A. Ross, Carl L. Steiner, P. G. Whitmore, Robert J. Bernard and Walter F. Jones, Jr., for protestants in one or both of the proceedings.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

These proceedings involve related issues and will be disposed of in a single report. They were heard on separate records and each was the subject of a separate recommended [fol. 87] order of the examiner to which it was referred. Exceptions were filed by applicant to the recommended order of the examiner in the title proceeding, and a number of rail and motor carriers operating in the affected territory replied. No exceptions were filed to the recommended order of the examiner in No. MC-116067 (Sub-No. 2) proceeding, but it was stayed by us and applicant was thereafter permitted to file a brief, to which a number of rail and motor carriers replied. Oral argument has been held. Our conclusions differ from those recommended in the title proceeding.

By application filed June 22, 1956, as amended, in the title proceeding, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with exceptions, between the points, over the regular routes, and in the manner described in appendix A hereto.

By application filed January 10, 1957, as amended, in No. MC-116067 (Sub-No. 2), hereinafter called the Sub-2 application or proceeding, the same applicant seeks authority to

transport the same commodities as in the title proceeding, over irregular routes, between Omaha, Nebr., on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Both applications are opposed by a large number of rail and motor carriers as hereinafter described.

[fol. 88] Applicant is a Nebraska corporation, initially organized June 14, 1956. It has an authorized capitalization of \$600,000 comprised of \$500,000 in preferred stock and \$100,000 in common stock. At the time of the hearings herein, 1 share of preferred stock had been issued, and there had been issued and paid for in cash \$37,500 in common stock. All but one-half share of the outstanding common stock is held, in varying amounts, by the following named motor carriers. The remaining one-half share is owned by one Harvey Tillman, who manages Tillman Transfer Company, which is owned by his wife, Helen L. Tillman. The stockholder-carriers are John Jack Romans, doing business as Romans Motor Freight; Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer; Royal F. Lyon, doing business as Lyon Transfer; C. C. McKay and Earl R. McKay, doing business as McKay Freight Line; Waldo W. Winter and Hubert B. Winter, doing business as Winter Bros.; Abler Transfer, Inc.; Herbert Peters, doing business as Fremont Express Co.; Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer; John Derickson, doing business as Derickson Transfer; Louis Steffensmeir and Edward Steffensmeir, doing business as Steffy's Transfer; and Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, all of which will hereinafter be referred to collectively as the stockholders-carriers, or individually by the names under which they are doing business. As of April 4, 1957, John Jack Romans was President of the corporation, C. C. McKay was Vice President, Walter F. Clark was Secretary, and Royal F. Lyon was Treasurer,

and such persons, together with Leonard Abler, of Abler Transfer Inc., were the directors of the corporation. Certificate [fol. 89] of these stockholder-carriers have heretofore conducted operations in interstate commerce, to the same extent as authorized in their Nebraska intrastate certificates, under the second proviso of section 206(a) of the Interstate Commerce Act, but they have since been granted certificates by this Commission. All are carriers of general freight operating over regular routes in eastern and central Nebraska converging upon Omaha, Lincoln, and Grand Island, Nebr., at which points they interchange traffic with other motor carriers for movement to and from points beyond Nebraska.

Applicant corporation owns no motor vehicles. It is contemplated that all vehicles initially required for the proposed operations will be leased from the stockholder-carriers or other carriers. As of January 26, 1957, applicant has assets totaling \$32,785 liabilities of \$467 and a net worth of \$32,318. As of March 31, 1957, the net worth of the corporation had decreased to \$25,825. It was granted temporary authority on December 4, 1956, for transportation as a motor common carrier of general commodities, with exceptions, between Omaha and Chicago, serving no intermediate points, and between Omaha and St. Louis, serving the intermediate point of Kansas City except on shipments moving to or from St. Louis. As of the date of the hearing in the Sub-2 proceeding, it was operating one round trip schedule daily between Omaha and Chicago and between Omaha and Kansas City, with additional trips as needed. Operations to and from St. Louis were on a call-and-demand basis and were confined to truckload shipments pending completion of arrangements for facilities at St. Louis to handle less-than-truckload traffic. Terminal facilities were being leased at Omaha, Chicago, and Kansas [fol. 90] City. All equipment operated was leased.

Applicant corporation was conceived and organized by the stockholder-carriers as a means of combatting a labor situation arising in the Spring of 1956, which threatened to deprive them of much of the interstate traffic which they had theretofore been handling, and, in fact, to drive them out of business entirely. For several years, the stockholder-

carriers have resisted all attempts on the part of the Teamsters Union² to organize their employees. Notwithstanding the almost complete lack of any inclination on the part of the employees for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top", that is, that organizational efforts should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a closed-shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. This was accomplished by declaring certain of the stockholder-carriers "unfair" and the institution of a secondary boycott against their traffic on the part of the larger unionized carriers with which the stockholder-carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to certain so-called "protection of rights" or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates [fol. 91] of the Teamsters Union. Such clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with a Union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exists.

Commencing in the early part of May, 1956, certain of the stockholder-carriers began to experience difficulty in effecting normal interchange arrangements with the larger line-haul carriers with which they had theretofore done business. This difficulty was experienced primarily at Omaha, but also to some extent at Lincoln and Grand Island, and con-

² International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

sisted of the refusal on the part of many of the larger carriers to accept outbound interline traffic tendered to them by the stockholder-carriers, and the refusal to turn over to the latter inbound traffic either routed over the latter's lines or which normally would have been turned over to them at Omaha and the other points named for ultimate delivery to interior Nebraska points served by them. None of the stockholder-carriers, except Clark Bros. Transfer, has ever had any dispute with its employees, and no picket lines had been established except around the Omaha terminal of Clark Bros. A picket line was established at the Clark Bros. Omaha terminal some time in September 1955, and all interline deliveries to the terminal ceased at that time. Four of Clark Bros.' seven employees at the Omaha terminal appear to have gone on strike [fol. 92] initially. Clark filed charges with the National Labor Relations Board against the Union for unfair labor practices and the history of that matter is adequately described in the examiner's report.

In addition to the interline difficulties experienced by the stockholder-carriers described above, certain Omaha shippers have experienced labor difficulties resulting in the establishment of picket lines around their establishments, and the resultant refusal on the part of the organized carriers to provide pickup and delivery service thereat. If the instant applications are granted, applicant proposes to offer free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring its services, regardless of picket lines.

At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to

have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, [fol. 93] and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha.

The Title Proceeding. As heretofore indicated, this application involves a proposed regular-route operation extending between Omaha, on the one hand, and, on the other, such points as Denver, Colo., Chicago, Minneapolis, Minn., and St. Louis, including service at intermediate points except in the case of a proposed alternate route between Omaha and Chicago.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application be denied. In so doing, he suggested that an application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the [fol. 94] stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms

occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through peaceful union picket lines amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

In their replies to the exceptions, the opposing carriers and the Union³ argue generally that the conclusions of the examiner are in accordance with the law and the facts and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that [fol. 95] the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the additional motor carrier service proposed and that

³ Separate replies were filed by Local 554 of the Teamsters Union, Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, and opposing rail carriers; and joint replies were filed (1) by Watson Bros. Transportation Co., Inc., Union Freightways, Red Ball Transfer Company, Navajo Freight Lines, Inc., Independent Truckers, Inc., Prucka Transportation, Inc., H. & W. Motor Express Co., and Denver-Chicago Trucking Company, Inc., and (2) by Illinois-California Express, Inc., Interstate Motor Lines, Inc., Ringsby Truck Lines, Inc., and Pacific Intermountain Express Co.

it is fit and able properly to conduct an operation of the scope involved.

There is no serious dispute as to the facts.⁴ An examination of the record establishes that the pertinent facts are accurately and adequately stated in the report which accompanied the examiner's recommended order, and we shall adopt such statement as our own, confining our discussion herein to the issues presented by the exceptions and replies thereto.

In addition to the stockholder-carriers, the title application is supported by a large number of persons operating businesses in Nebraska who have occasion to ship or receive merchandise to or from points beyond the State and who, in many instances, are dependent upon the regularly scheduled service of the stockholder-carriers to meet their normal everyday transportation requirements. These persons represent business houses of various types at such points as Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. As a result of the [fol. 96] breakdown of interchange arrangements at Omaha, shippers at interior Nebraska points have experienced delays in the movement of their outbound shipments to destination, and consignees at such points have experienced delays, inconveniences, and unforeseen expense in connection with their inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most logical manner, namely, over the lines of the stockholder-carriers providing daily scheduled service to their communities. When motor shipments are diverted to rail, the consignees suffer not only delays in delivery but also the additional expense of having to pay a combination of rail and motor local rates since there are no joint motor-rail rates published on such traffic through Omaha.

The difficulties of the Omaha shippers supporting the application are of a somewhat different nature. These firms,

⁴ Reference in the examiner's report to the fact that Clark Bros. Transfer had seven employees on September 14, 1955 is intended to refer to employees at the Omaha terminal only.

as a result of disputes with various labor organizations, have had picket lines established around their premises, and the refusal of the organized carriers to cross such picket lines has resulted in the almost complete withdrawal of motor service to their establishments. Of the three firms in this category, two have succeeded in resolving their labor disputes, at least to the extent of having the pickets withdrawn, and they were experiencing no difficulty at the time of the close of the hearings herein. The remaining firm, which operates a storage and distribution business in Omaha, with two warehouses at that point and one at Council Bluffs, Iowa, has had a Teamsters' picket line around the Omaha warehouses since May 24, 1956, and has been virtually without motor service because of the refusal of the unionized carriers to cross the picket lines. It has suffered a substantial loss of business as a result of its inability to obtain motor service for inbound deliveries and outbound distribution shipments. There is no evidence of violence or impending violence in connection with the picketing of any of these firms, and the refusal of the organized carriers to provide or attempt to provide pickup and delivery service appears to have resulted from their adherence to their "hot cargo" agreements, without regard to their obligations as common carriers.

The evidence concerning inadequate service, or lack of service, experienced by the supporting shippers is confined to shipments moving to or from points in eastern Nebraska, and there is no indication whatever of a need or professed need for additional facilities for the movement of traffic between many of the points embraced in the application. Similarly, the service failures attributable to the breakdown of interchange arrangements appears to have occurred primarily and preponderantly as a result of the breakdown of interchange arrangements at Omaha, which is the gateway through which most of the eastern Nebraska traffic flows. As to origins and destinations beyond Nebraska, the evidence is concerned primarily with traffic moving to and from Des Moines, Minneapolis, Chicago, St. Louis, and Kansas City. There is no evidence of any substantial need for service to and from Denver or St. Joseph, Mo., which points were mentioned by a few of the supporting shippers. The

application contains no practicable routing for the movement of freight between Omaha and Des Moines, and there [fol. 98] is no satisfactory explanation as to why traffic moving between eastern Nebraska points and Minneapolis could not be routed through the Sioux City, Iowa, gateway, and thus bypass the Omaha interchange. Considering all of the evidence presented, therefore, it would appear to establish a need for additional motor service within the scope of the instant application between Omaha, on the one hand, and, on the other, Chicago, St. Louis, and Kansas City, restricted to traffic originating at or destined to points in Nebraska.

Evidence in opposition to the application was submitted on behalf of Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Denver-Chicago Trucking Company, Inc., Union Freightways, Illinois-California Express, Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Red Ball Transfer Company, Ringsby Truck Lines, Inc., Watson Bros. Transportation Co., Inc., and a number of rail carriers. All of the named motor carriers, except Pacific Intermountain Express and Denver-Chicago, serve Omaha. Of those serving Omaha, Burlington Truck, Union Freightways, Illinois-California, Independent Truckers, Interstate, Navajo, Red Ball, Ringsby, and Watson Bros. operate between Omaha and Chicago. Five of the above named carriers, Red Ball, Watson Bros., Union Freightways, Burlington Truck, and Santa Fe Trail, operate between Omaha and Kansas City; Watson Bros., Union Freightways, and Burlington Truck operate between Omaha and St. Louis; Watson Bros. and Union Freightways operate between Omaha and Minneapolis; and Watson operates between Omaha and Des Moines. All of the opposing railroads serve Omaha, and, either directly or through their connections, serve all principal points on the routes involved in the instant application.

[fol. 99] *The Sub-2 Application.* By this application, applicant seeks authority to transport general freight between Omaha and all points in 32 States. As in the title proceeding, the application is based upon an alleged inadequacy of existing motor service by reason of the refusal

of most of the organized carriers serving Omaha to interchange traffic with the stockholder-carriers and their refusal to provide pickup and delivery service at the establishments of certain Omaha firms at which union picket lines have been established.

The examiner found that applicant had failed to establish that public convenience and necessity require the operation for which authority is sought, and recommended that the application be denied. As heretofore indicated, no exceptions were filed to the recommended order, but applicant was permitted to file a brief after the service of the order and the opposing carriers replied thereto. In its brief, applicant argues that it has met its burden of proving a need on the part of the public for the service proposed; that the granting of the authority sought is necessary in order to insure adequate transportation facilities to a substantial portion of the shipping public of Nebraska; that it is fit, willing, and able properly to provide the service shown to be required; and that it is the primary duty of the Commission to develop a national transportation system adequate to meet the needs of the commerce of all parts of the country. In their replies, the opposing carriers urge that applicant has failed to establish a need for any substantial portion of the service proposed; that it has failed to provide any convincing evidence that it is able, financially and otherwise, to conduct an operation of the scope suggested; that existing rail and motor services have not been shown to be inadequate; that any inadequacies experienced by the supporting shippers are attributable to labor difficulties over which this Commission has no jurisdiction; that any grievances which the stockholder-carriers or the shipping public may have against existing carriers should be made the subject of a complaint proceeding rather than an application for additional operating rights such as here involved; and that the authority of the Commission to grant new operating authority should not be used to circumvent labor disputes or cure temporary service deficiencies resulting therefrom.

The pertinent facts of record are adequately stated in the report which accompanied the examiner's recommended

order and we adopt such statement, as hereinafter augmented or modified, as our own.

In spite of the broad territorial scope of the application, and the voluminous testimony adduced from the stockholder-carriers concerning their inability to effect normal interchange arrangements with a number of the organized carriers serving Omaha, very little evidence was submitted in this proceeding on behalf of persons or firms having occasion to make shipments through the Omaha gateway. Representatives of only six shippers appeared in support of the application. Of these, the Omaha Parlor Frame Com-[fol. 101] pany, which is engaged in the manufacture of wooden furniture at Omaha, was experiencing no transportation difficulties at the time of the hearing herein, and testimony submitted in its behalf as to a need for additional motor service need not further be considered. The Broyhill Company manufactures farm equipment at its plant at Dakota City, Nebr., which is about 6 miles south of Sioux City, Iowa. During 1956, and the first quarter of 1957, it made shipments of its products to scattered points in 30 of the States embraced in the instant application and received inbound shipments of raw materials from scattered points in 17 of the States involved. There is no indication as to the frequency of the shipments referred to, the volume moved to any particular point, whether the traffic moved by rail or motor vehicle, whether, if by truck, it moved in truckload or less-than-truckload quantities, or how much moved through the Omaha gateway. On or about March 15, 1957, a number of its employees went on strike and a picket line was established around its Dakota City plant. As a result, the carriers formerly serving its plant, except stockholder Abler Transfer, discontinued providing pickup and delivery service at the plant. It supports the instant application in order that it may route inbound and outbound shipments via Abler Transfer through Omaha, at which point the shipments would be interchanged with applicant.

* Omaha Parlor Frame Company and the Chardon Company are affiliated firms occupying the same premises at Omaha. No attempt was made to distinguish between the separate requirements of the affiliates, and we shall consider them as a single firm.

Two firms at Ord, Nebr., support the application. One is a dealer in farm implements and has occasion to receive shipments of implements and parts from Hopkins, Minn., [fol. 102] Chicago and Rock Island, Ill., and Kansas City. The other sells and constructs steel farm buildings and receives most of its materials from Detroit, Mich. Their inbound shipments move predominantly through Omaha and they specify Romans Motor Freight as the delivering carrier out of Omaha because Romans provides a daily service between Omaha and Ord. Their routing instructions are frequently ignored and they have experienced numerous delays in delivery as a result of the traffic having been turned over for ultimate delivery to rail carriers or motor carriers serving Ord only on an irregular nonscheduled basis. Shipments diverted to rail involve added expense to the consignees because they are required to pay the difference between the all-motor joint rates under which the shipments were dispatched and the combination local motor and rail rates through Omaha or other points. A majority of the consignments to these two firms are in less-than-truckload quantities.

Wheeler Lumber, Bridge & Supply Company supplies bridge construction materials and pole line materials to contractors. It has a warehouse at Norfolk and has occasion to ship or receive supplies from or to that point. The majority of its supplies, consisting of lumber and poles, originate on the west coast and move into Norfolk by rail. It does, however, receive some materials from such points as Minneapolis and Duluth, Minn., Chicago and Peoria, Ill., St. Louis, Kansas City, and Pittsburgh, Pa., and about 75 percent of such traffic moves by truck. It has received alternate service from Clark Bros., and Abler Transfer in [fol. 103] respect of traffic moving through the Omaha gateway and regularly specifies delivery by such carriers from Omaha. Such routing instructions are not always followed, however, and it frequently has experienced unwarranted delays in the delivery of its materials at Norfolk. It admittedly has single-line service from Minneapolis to Norfolk through the Sioux City gateway, and no difficulty appears to have been encountered on traffic moving in that manner. The company also has occasion to make outbound

shipments from its Norfolk warehouse to points in Iowa, and to some extent to points in Kansas, Minnesota, South Dakota, and Wyoming. If the instant application is granted, it might ship to points in such States through the Omaha gateway, although admittedly the routing through Omaha would be circuitous to points north and west of Norfolk. As to the inbound shipments, there is no indication as to the volume received from any particular point, the frequency of service which might be required, or the percentage of shipments which might move in truckload or less-than-truckload quantities. As to the outbound traffic, there is no indication as to the points at which it desires service, the volume of traffic which might be expected to move into such States, the frequency of service which might be required, the nature of the shipments as to whether truckload or less-than-truckload, or the routings heretofore utilized. Further, the shipper appears to have made little or no investigation as to the service available to it other than that in connection with Clark Bros., and J. Abler Transfer through the Omaha gateway.

[fol. 104] The remaining shipper submitting evidence in support of the application is Ford Storage and Moving Company. This firm operates two general warehouses at Omaha, and one at Council Bluffs, and has occasion to receive shipments of merchandise from out-of-State points and to make distribution of merchandise to points in the surrounding States. A Teamsters' picket line was established at its Omaha warehouses on or about May 24, 1956, and was still in existence at the time of the hearing herein. As a result, practically all inbound motor deliveries were discontinued and all attempts to obtain outbound service from the warehouses by unionized motor carriers theretofore utilized have been unsuccessful. Suppliers have been requested to make all inbound shipments by rail and they appear to have been generally agreeable. The inability to obtain outbound service from the unionized carriers is said to have resulted in the loss of certain substantial accounts, and it is feared that additional business losses will result from the company's inability to obtain motor service, both inbound and outbound, to the extent that such service was available prior to the time the picket lines were established,

The record is vague and confusing as to the exact nature and scope of the motor service which might be required. During 1956, prior to the establishment of the picket lines, the company received inbound motor shipments, in substantial quantity, from Chicago, St. Louis, Kansas City, Louisville, Ky., Durham and Winston-Salem, N. C., Cincinnati, Ohio, Beloit, Wis., and Sioux Falls, S. Dak., and in [fol. 105] smaller quantity from Bloomington, Ill., Duluth and Minneapolis, Minn., Buffalo, N. Y., Toledo, Ohio, and Houston, Tex. All of this traffic, however, with the exception of that originating at the two Minnesota points, appears to have either originated or been interchanged at Chicago, St. Louis, or Kansas City. Only 23,000 pounds originated at Duluth, and only 4,000 pounds at Minneapolis, and there is no indication as to the routing. There is no information whatever concerning the nature and extent of the outbound motor shipments made during that period, or thereafter, except the mere statement that outbound traffic moves to points in Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado, and that some is transported by rail and some by motor vehicle.

Obviously, the evidence submitted on behalf of the supporting shippers falls far short of establishing any substantial need on the part of the shipping public for additional motor service to the extent proposed, or, in fact, to any extent exceeding that for which a need is shown in the title proceeding and duplicative thereof. We cannot consistently grant authority for the institution of a new service without a clear indication that the service sought to be established is needed by the shipping public and will be utilized in the event the authority sought is granted. We cannot make the necessary findings concerning a need for additional service unless we are furnished precise information in connection therewith. The fact that the stockholder-carriers have experienced difficulty in effecting interchange [fol. 106] arrangements at Omaha and the fact that a few Omaha shippers have experienced difficulty in obtaining pickup and delivery service at their places of business does not establish a need for additional single-line service between Omaha and all points in 32 States.

In addition to the paucity of evidence concerning the existence of any substantial need on the part of the public for the service proposed, there is no convincing evidence that applicant has the resources or the experience to conduct such an extensive operation. No plan is advanced and none is apparent for handling less-than-truckload traffic over such a wide area and a considerable portion of the traffic here involved falls within that category. Even in connection with the movement of truckload traffic there is serious doubt as to whether applicant would be able to obtain return loads with sufficient frequency to effect a feasible and profitable overall operation.

We conclude that applicant has failed to establish a need on the part of the public for any part of the service proposed in the Sub-2 proceeding with the possible exception of that between Omaha and such points as Chicago, St. Louis, and Kansas City, which service would duplicate that for which authority is sought in the title proceeding, and that the Sub-2 application should be denied. In the circumstances, there is no need to discuss the voluminous evidence submitted on behalf of the opposing rail and motor carriers operating in the affected territory.

[fol. 107] *Further Discussion and Conclusions.* We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding-out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their

certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations.

The breakdown in interchange arrangements at Omaha between the unionized carriers and the stockholder-carriers, and the refusal of the unionized carriers to provide pickup and delivery service at establishments where picket lines have been established has resulted in a substantial dis-[fol. 108] ruption in motor service to a large portion of the Nebraska shipping public; and the responsibility for the service deficiencies shown to exist must be laid at the doors of the unionized carriers which preempted their obligations to the Union to their obligations to the public. We do not hold that all instances of refusal to provide service are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers. The apprehensions of certain of the organized carriers that any opposition to the demands of the Union would have resulted in reprisals against them appears greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros., Transportation Co., Inc., changed its policy against interchange with "unfair" carriers before the close of the hear-[fol. 109] ings herein without experiencing any difficulty.

The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by the mere acquiescence in the boycott, the unionized carriers lose the protection which section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby. See *Carpenters' Union v. Labor Board*, 357 U.S. 93.

In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely the filing of the instant applications under the provisions of section 207 of the act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved [fol. 110] carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen.

One other matter requires consideration. As seen, the stockholders of the applicant corporation are carriers in their own right and jointly control applicant through stock ownership. Section 5 of the act provides that it shall be lawful *with the approval and authorization of the Commission* for any carrier, or two or more carriers jointly, to acquire control of another carrier through ownership of its stock. No application for such approval and authorization has been filed in connection with the acquisition

by the stockholder-carriers of control of applicant, and any grant of authority found warranted herein will be conditioned upon the filing of such an application and the obtaining of our approval for the control now exercised.

At this point it may be well to note that the situation here presented differs from that considered in *Galveston Truck Line Corporation Extension—Oklahoma*, M.C.C.

, decided concurrently herewith, in that the labor difficulties upon which the cited proceeding was based had, with one minor exception, ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term "present or future public convenience and necessity" in section 207 of the act, under which the applications were filed.

We find, in No. MC-116067, that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common [fol. 111] carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Nebr., and Chicago, Ill., (a) from Omaha over Alternate U. S. Highway 30 to junction U. S. Highway 30 at or near Missouri Valley, Iowa, thence over U. S. Highway 30 to junction Illinois Highway 65 at or near Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, thence over U. S. Highway 34 to Chicago, and return over the same route, and (b) from Omaha over U. S. Highway 6 to junction U. S. Highway 66 near Joliet, Ill., thence over U. S. Highway 66 to Chicago, and return over the same route, and (2) between Omaha and St. Louis, Mo., from Omaha over U. S. Highway 275 to junction U. S. Highway 34 at or near Glenwood, Iowa, thence over U. S. Highway 34 to Kansas City, Mo., thence over U. S. Highway 40 to St. Louis, and return over the same route, serving no intermediate points on routes (1)(a) and (1)(b), and serving the intermediate point of Kansas City on route (2), restricted, in each instance, to traffic

originating at or destined to points in Nebraska; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, subject to the condition that the stockholder-carriers controlling applicant shall first obtain our approval of such control under the provisions of section 5 of the Interstate Commerce Act; and that in all other respects the application should be denied.

We further find, in No. MC-116067 (Sub-No. 2), that applicant has failed to establish that the proposed operation [fol. 112] is required by the present or future public convenience and necessity, and that the application should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, and upon obtaining our approval of the acquisition by its stockholders of control of the corporation, an appropriate certificate will be issued. An order will be entered denying No. MC-116067 except to the extent granted herein, and denying No. MC-116067 (Sub-No. 2) in its entirety.

COMMISSIONERS MURPHY, WALRATH, GOFF, and WEBB did not participate.
[fol. 113]

No. MC-116067

APPENDIX A

NEBRASKA SHORT LINE CARRIERS, INC.

DESCRIPTION OF AUTHORITY SOUGHT

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30, to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Mis-

souri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph, Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

[fol. 114]

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of . . . June, A. D. 1959.

No. MC-116067

NEBRASKA SHORT LINE CARRIERS, INC.,
COMMON CARRIER APPLICATION

No. MC-116067 (Sub-No. 2)

NEBRASKA SHORT LINE CARRIERS, INC.,
EXTENSION—32 STATES

Investigation of the matters and things involved in these proceedings having been made, and said Commission, on

the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application in No. MC-116067, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That said application in No. MC-116067 (Sub-No. 2), be, and it is hereby denied.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 115]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff,

—vs.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants,

and

SANTA FE TRAIL TRANSPORTATION COMPANY,
Plaintiff-Intervenor.

ORDER GRANTING SANTA FE TRAIL TRANSPORTATION COMPANY
LEAVE TO INTERVENE AS PARTY-PLAINTIFF AND TO FILE
ITS COMPLAINT—Filed and entered June 6, 1960

This cause coming on to be heard at this time on motion
of Santa Fe Trail Transportation Company, by its counsel,
for leave to intervene in the above entitled cause as party-

plaintiff, and to file its Complaint, and pursuant to Stipulation by and between the parties hereto, and upon consideration of such motion, it is this 6th day of June, 1960,

Ordered, Adjudged and Decreed, that said motion by Santa Fe Trail Transportation Company for leave to intervene as party-plaintiff, and for leave to file its said Complaint herein, be, and the same is hereby granted, pursuant to the stipulation by and between the parties hereto.

Enter :

Frederick O. Mercer, Judge, United States District Court, Southern District of Illinois, Northern Division.

Dated at Peoria, Illinois
June 6, 1960

[fol. 116] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action Docket No. P-3306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff,

—vs.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants,

and

SANTA FE TRAIL TRANSPORTATION COMPANY,
Plaintiff-Intervener.

COMPLAINT OF INTERVENER SANTA FE TRAIL TRANSPORTATION
COMPANY—Filed June 6, 1960

Comes now Santa Fe Trail Transportation Company, by its attorneys Starr Thomas, Roland J. Lehman and David

Axelrod, and files this, its Complaint for the purpose of seeking the issuance of interlocutory and permanent injunctions against the United States of America and the Interstate Commerce Commission and their officers and agents, restraining the enforcement of the orders of the Interstate Commerce Commission in the proceeding entitled "*Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC-116067," and in support thereof states as follows:

1. That it realleges Paragraph 1 of the Complaint heretofore filed by Burlington Truck Lines, Inc.

2. That since the residence and principal offices of Burlington Truck Lines, Inc., plaintiff herein, are located in Galesburg, Knox County, Illinois, the venue of this action is in the United States District Court for the Southern District of Illinois, Northern Division, pursuant to the provisions of Title 28 U. S. Code, Section 1398.

[fol. 117] 3. That Santa Fe Trail Transportation Company, whose principal place of business is located in Wichita, Kansas, is a common carrier by motor vehicle subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Arkansas, Colorado, Kansas, Missouri, Nebraska, New Mexico, Oklahoma and Texas, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-30605 and various subs thereunder.

4. That it realleges Paragraphs 3 and 4 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

5. That the applications of Nebraska Short Line Carriers, Inc. referred to above were opposed before the Interstate Commerce Commission by eighteen motor carriers, including Santa Fe Trail Transportation Company.

6. That it realleges Paragraph 6 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

7. That by an order dated March 10, 1960, the Interstate Commerce Commission, a defendant herein, denied

the petitions for reconsideration and/or further hearing which had been filed by certain protesting carriers, including the petition of Santa Fe Trail Transportation Company for reconsideration, filed July 6, 1959.

8. That it realleges Paragraphs 8, 9 and 10 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

9. That the Commission failed, specifically, to find, among others, that any inadequacy existed in the service being rendered by existing carriers, including intervenor who opposed the application. That, in fact, the findings of the Commission in Exhibits A, B and C (attached to the Complaint of Burlington Truck Lines, Inc.) establish that intervenor adequately and faithfully discharged its duties as a common carrier of property in interstate commerce.

[fol. 118] 10. That it realleges Paragraph 12 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

11. That the evidence adduced at the various hearings conducted by the Interstate Commerce Commission to consider the applications of Nebraska Short Line Carriers, Inc. indicates clearly that the alleged deficiencies in service of some carriers were only temporary and were solely the result of the efforts of the International Brotherhood of Teamsters to organize various business enterprises in the State of Nebraska. There is no finding that intervenor failed in any way to fulfill its duties as a common carrier during the period involved.

12. That the labor dispute which caused the temporary deficiencies in service of some carriers was settled by April 4, 1957 when the hearing in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067, Sub 2, was held, and therefore the issues raised had already become moot, and although the Interstate Commerce Commission had granted authority to Nebraska Short Line Carriers, Inc. to temporarily operate for the purpose of relieving against alleged deficiencies in service, the Examiner, in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067, Sub 2 (Exhibit B to plaintiff's Complaint) found that opposing

carriers, including intervenor, have always been willing to provide service for all shippers and carriers in the area involved.

13. That it realleges Paragraph 15 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

14. That intervenor has no interest, nor has it ever had any interest whatsoever, concerning whether various business enterprises which the International Brotherhood of Teamsters sought to organize are or are not organized.

15. That it realleges Paragraphs 17, 18 and 19 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

[fol. 119] 16. That intervenor, as the record before the Commission, and the findings of the Examiners (see Exhibit A, sheets 24 and 25, and Exhibit B, sheet 23) demonstrate, has expended large sums of money for the purpose of acquiring personnel, terminal facilities, motor carrier equipment and other property necessary to provide motor carrier service to shippers in interstate commerce, and is authorized to, and has and is rendering adequate service between many of the points between which the Interstate Commerce Commission granted a certificate to Nebraska Short Line Carriers, Inc. to operate.

17. That unless the orders of the Interstate Commerce Commission granting Nebraska Short Line Carriers, Inc. authority to operate as a result of the organizational activities of the International Brotherhood of Teamsters are enjoined and otherwise made null and void, intervenor will lose substantial sums of money and be deprived of its right to enjoy the exercise of its certificate without unwarranted competition as a result of an occurrence over which it had no control, which it did not create, and which it could not have prevented, thus resulting in a destruction of its own service.

18. That it realleges Paragraph 22 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

Wherefore, intervener respectfully prays:

(1) That the presiding Judge of this Court shall call to his assistance in the hearing and determination thereof, two other Judges of whom at least one shall be a Circuit Judge, and the Court thus constituted and convened shall hear this Complaint upon due and legal notice to the defendants in accordance with the provisions of 28 U. S. C. 2284 and 2321 to 2325;

(2) That upon final hearing of this case, the Court enter a decree which shall adjudge the orders of the Interstate Commerce Commission entered June 1, 1949 and March [fol. 120] 10, 1960, in the matter of *Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC-116067, to have been entered in violation of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, and, therefore, that they are unlawful, null and void; and

(3) That the Court grant such other and further relief in the premises as it may deem fitting and appropriate.

Santa Fe Trail Transportation Company, By: Starr Thomas and By: Roland J. Lehman and By: David Axelrod, Its Attorneys.

Starr Thomas, Roland J. Lehman, 80 East Jackson Boulevard, Chicago 4, Illinois, HArrison 7-4900.

David Axelrod, Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago 3, Illinois, CEntral 6-9375.

Dated—June 3, 1960

[fol. 121]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff.

—vs.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants,

and

SANTA FE TRAIL TRANSPORTATION COMPANY,
Plaintiff-Intervener,

and

WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER
CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT
TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC.,
INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES,
INC., and RINGSBY TRUCK LINES, INC., Plaintiff-Inter-
veners.

ORDER GRANTING WATSON BROS. TRANSPORTATION CO., INC.,
RED BALL TRANSFER CO., INTERSTATE MOTOR FREIGHT
SYSTEM, INC., INDEPENDENT TRUCKERS, INC., ILLINOIS-
CALIFORNIA EXPRESS, INC., INTERSTATE MOTOR LINES, INC.,
NAVAJO FREIGHT LINES, INC., AND RINGSBY TRUCK LINES,
INC. LEAVE TO INTERVENE AS PARTIES-PLAINTIFF AND TO
FILE THEIR COMPLAINT—June 27, 1960

This cause coming on to be heard at this time on motion
of Watson Bros. Transportation Co., Inc., Red Ball Transfer
Co., Interstate Motor Freight System, Inc., Independent
Truckers, Inc., Illinois-California Express, Inc., Interstate
Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby
Truck Lines, Inc., by their counsel, for leave to intervene

in the above entitled cause as parties-plaintiff, and to file their Complaint, and pursuant to Stipulation by and between the parties hereto, and upon consideration of such [fol. 122] motion, it is this 27th day of June, 1960, it is hereby

Ordered, Adjudged and Decreed that said motion by Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc. for leave to intervene as parties-plaintiff, and for leave to file their said Complaint herein, be, and the same is hereby granted, pursuant to the stipulation by and between the parties hereto.

Enter :

Frederick O. Mercer, Judge, United States District Court, Southern District of Illinois, Northern Division.

Dated at Peoria, Illinois

June 27, 1960

[fol. 123]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff,

—vs.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants,

and

SANTA FE TRAIL TRANSPORTATION COMPANY,
Plaintiff-Intervener,

and

WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER
CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT
TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC.,
INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES,
INC., and RINGSBY TRUCK LINES, INC., Plaintiff-Inter-
veners.COMPLAINT OF INTERVENERS WATSON BROS. TRANSPORTATION
CO., INC., RED BALL TRANSFER CO., INTERSTATE MOTOR
FREIGHT SYSTEM, INC., INDEPENDENT TRUCKERS, INC.,
ILLINOIS-CALIFORNIA EXPRESS, INC., INTERSTATE MOTOR
LINES, INC., NAVAJO FREIGHT LINES, INC., AND RINGSBY
TRUCK LINES, INC.—Filed June 27, 1960Come now Watson Bros. Transportation Co., Inc., Red
Ball Transfer Co., Interstate Motor Freight System, Inc.,
Independent Truckers, Inc., Illinois-California Express,
Inc., Interstate Motor Lines, Inc., Navajo Freight Lines,
Inc., and Ringsby Truck Lines, Inc., by their attorneys,
Axelrod, Goodman & Steiner, and file this, their Complaint
for the purpose of seeking the issuance of interlocutory

and permanent injunctions against the United States of America and the Interstate Commerce Commission and their [fol. 124] officers and agents, restraining the enforcement of the orders of the Interstate Commerce Commission in the proceeding entitled "*Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC-116067," and in support thereof state as follows:

1. That they reallege Paragraph 1 of the Complaint heretofore filed by Burlington Truck Lines, Inc.

2. That since the residence and principal offices of Burlington Truck Lines, Inc., plaintiff herein, are located in Galesburg, Knox County, Illinois, the venue of this action is in the United States District Court for the Southern District of Illinois, Northern Division, pursuant to the provisions of Title 28 U. S. Code, Section 1398.

3. That Watson Bros. Transportation Co., Inc., whose principal place of business is located in Omaha, Nebraska, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Arizona, California, Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico and Wyoming, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-70451 and various subs thereunder.

4. That Red Ball Transfer Co., whose principal place of business is located in Omaha, Nebraska, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Colorado, Illinois, Iowa, Kansas, Missouri, and Nebraska pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-105807 and various subs thereunder.

5. That Interstate Motor Freight System, Inc., which acquired the operating assets, among other things, of Prucka Transportation, Inc., in *Interstate Motor Freight*

System, Inc.—Control—Prucka Transportation, Inc., MC-F-6859, and whose principal place of business is located in Grand Rapids, Michigan, is a common carrier by motor [fol. 125] vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, Wisconsin, Colorado, Kansas, Nebraska and Wyoming, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-35628 and various subs thereunder.

6. That Independent Truckers, Inc., whose principal place of business is located in Omaha, Nebraska, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Colorado, Illinois, Indiana, Iowa and Nebraska, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-55874 and various subs thereunder.

7. That Illinois-California Express, Inc., whose principal place of business is located in Denver, Colorado, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Arizona, California, Colorado, Illinois, Iowa, Nebraska, Nevada, New Mexico, Oklahoma, Texas and Wyoming, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-48958 and various subs thereunder.

8. That Interstate Motor Lines, Inc., whose principal place of business is located in Salt Lake City, Utah, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between

points in California, Colorado, Idaho, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Oregon, Utah and Wyoming, pursuant to a Certificate of Public Convenience and Necessity [fol. 126] issued to it by the Interstate Commerce Commission in Docket No. MC-33641 and various subs thereunder.

9. That Navajo Freight Lines, Inc., whose principal place of business is located in Denver, Colorado, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Texas and Utah, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-76032.

10. That Ringsby Truck Lines, Inc., whose principal place of business is located in Denver, Colorado, is a common carrier by motor vehicle, subject to the Interstate Commerce Act, and is authorized to engage in the transportation of general commodities to, from and between points in Arizona, California, Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Utah and Wyoming, pursuant to a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission in Docket No. MC-52709.

11. That they reallege Paragraphs 3 and 4 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

12. That the applications of Nebraska Short Line Carriers, Inc., referred to above, were opposed before the Interstate Commerce Commission by eighteen (18) motor carriers, including Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., as well as certain rail carriers (see Sheet 2 of Exhibit A attached to Complaint of plaintiff Burlington Truck Lines, Inc.).

13. That since the hearings in the above captioned proceeding, Interstate Motor Freight System, Inc. has acquired and merged into it the operations of Prucka Transportation, Inc., which was a party in the above captioned proceeding before the Interstate Commerce Commission. [fol. 127] The merger of Interstate Motor Freight System, Inc. and Prucka Transportation, Inc. has been approved by the Interstate Commerce Commission in *Interstate Motor Freight System, Inc.—Control—Prucka Transportation, Inc.*, MC-F-6859.

14. That they reallege Paragraph 6 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

15. That by an order dated March 10, 1960, the Interstate Commerce Commission, a defendant herein, denied the petitions for reconsideration and/or further hearing which had been filed by certain protesting carriers, including the petition for reconsideration and/or further hearing of Watson Bros. Transportation Co., Inc., filed August 7, 1959; the petition of Red Ball Transfer Co. to stay the order of the Commission and to reopen the proceeding for further hearing, filed July 6, 1959; the petition of Prucka Transportation, Inc. for reconsideration and/or further hearing, dated August 7, 1959, and the petition of Independent Truckers, Inc. for reconsideration and/or further hearing, dated August 7, 1959.

16. That they reallege Paragraphs 8, 9 and 10 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

17. That the Commission failed, specifically, to find, among other things, that any inadequacy existed in the service being rendered by existing carriers, including interveners who opposed the application. That, in fact, the findings of the Commission in Exhibits A, B and C (attached to the Complaint of plaintiff Burlington Truck Lines, Inc.) establish that interveners adequately and faithfully discharged their duties as common carriers of property in interstate commerce.

18. That they reallege Paragraph 12 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

19. That the evidence adduced at the various hearings conducted by the Interstate Commerce Commission to consider the applications of Nebraska Short Line Carriers, Inc. indicates clearly that the alleged deficiencies in service of some carriers were only temporary and were solely the result of the efforts of the International Brotherhood of [fol. 128] Teamsters to organize various business enterprises in the State of Nebraska. There is no finding that any of the interveners failed in any way to fulfill their duties as common carriers during the period involved.

20. That the labor dispute which caused the temporary deficiencies in service of some carriers was settled by April 4, 1957 when the hearing in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067, Sub 2, was held, and therefore the issues raised had already become moot, and although the Interstate Commerce Commission had granted authority to Nebraska Short Line Carriers, Inc. to temporarily operate for the purpose of relieving against the alleged deficiencies in service, the Examiner, in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067, Sub 2 (Exhibit B to plaintiff's Complaint) specifically found that by April 3, 1957 Watson Bros. Transportation Co., Inc., Prucka Transportation, Inc., and Independent Truckers, Inc., among others, were providing normal service for all shippers and carriers in the area involved. In addition, the Examiner found that other carriers, including interveners, have always been willing to provide service for all shippers and carriers in the area involved.

21. That they reallege Paragraph 15 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

22. That interveners have no interest, nor have they ever had any interest whatsoever, concerning whether various business enterprises which the International Brotherhood of Teamsters sought to organize are or are not organized.

23. That they reallege Paragraphs 17, 18 and 19 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

24. That interveners, as the record before the Commission, and the findings of the Examiner (see Exhibit A, sheets 24 and 25, and Exhibit B, sheet 23) demonstrate, have expended large sums of money for the purpose of acquiring personnel, terminal facilities, motor carrier equipment and other property necessary to provide motor carrier service to shippers in interstate commerce, and are [fol. 129] authorized to, and have and are rendering adequate service between Omaha and Chicago, St. Louis and Kansas City, the exact points between which the Interstate Commerce Commission granted a certificate to Nebraska Short Line Carriers, Inc.

25. That unless the orders of the Interstate Commerce Commission granting Nebraska Short Line Carriers, Inc. authority to operate as a result of the organizational activities of the International Brotherhood of Teamsters are enjoined and otherwise made null and void, interveners will lose substantial sums of money and be deprived of the right to enjoy the exercise of their certificates without unwarranted competition as a result of an occurrence over which they had no control, which they did not create, and which they could not have prevented, thus resulting in a destruction of their own service.

26. That they reallege Paragraph 22 of the Complaint heretofore filed by plaintiff Burlington Truck Lines, Inc.

Wherefore, interveners respectfully pray:

(1) That the presiding Judge of this Court shall call to his assistance in the hearing and determination thereof, two other Judges of whom at least one shall be a Circuit Judge, and the Court thus constituted and convened shall hear this Complaint, upon due and legal notice to the defendants in accordance with the provisions of 28 U. S. C. 2284 and 2321 to 2325;

(2) That upon final hearing of this case, the Court enter a decree which shall adjudge the orders of the Interstate Commerce Commission entered June 1, 1949 and March 10, 1960, in the matter of *Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC-

116067, to have been entered in violation of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, and, therefore, that they are unlawful, null and void; and

[fol. 130] (3) That the Court grant such other and further relief in the premises as it may deem fitting and appropriate.

Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc.,
By: Axelrod, Goodman & Steiner, Their Attorneys.

David Axelrod, Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago 3, Illinois, CEntral 6-9375.

Dated: June 24, 1960

[fol. 131] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

Civil Action Docket No. P 2306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff,
vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

ORDER GRANTING MOTION FOR LEAVE TO INTERVENE—

Filed and entered July 1, 1960

This hearing coming on to be heard upon the Petition of Nebraska Short Line Carriers, Inc., for leave to intervene as further Defendant and to file their answer instantler, and the Court having considered the matter and being fully advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed that the Motion of the said Nebraska Short Line Carriers, Inc., for leave to intervene be granted and they are hereby given further leave to file their answer instanter.

Frederick O. Mercer, Judge.

Entered at Peoria, Illinois, this 1st day of July, 1960.

[fol. 132]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

Civil Action Docket No. P 2306

BURLINGTON TRUCK LINES, Inc., a corporation, Plaintiff,

—vs.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

ANSWER OF INTERVENER NEBRASKA SHORT LINE
CARRIERS, INC.—Filed July 1, 1960

Comes Now Nebraska Short Line Carriers, Inc., intervener-defendant, and for its answer to the Complaint of plaintiff, alleges as follows:

I.

That Nebraska Short Line Carriers, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, for the purpose of operating as a motor common carrier of general commodities, with its principal place of business located at 605 South 12th Street, Lincoln, Nebraska.

II.

That said intervener-defendant was the applicant in the proceeding before the Interstate Commerce Commission entitled "Nebraska Short Line Carriers, Inc.,—Common Carrier Application, Docket No. MC-116067", and by order of the Interstate Commerce Commission, entered in said proceeding, was granted authority to operate as a common carrier by motor vehicle in the transportation of general commodities, with certain exceptions, over regular routes between Omaha, Nebraska, and Chicago, Illinois, and between [fol. 133] Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate point of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska, which order plaintiff seeks to have declared null and void, and that said intervener-defendant is, therefore, the real party in interest in this action.

III.

Admits the allegations of paragraphs II to VII, both inclusive, of plaintiff's Complaint.

IV.

The Order of the Interstate Commerce Commission, dated June 1, 1959, is based upon clear and convincing evidence establishing:

(a) That the proposed service would serve a useful purpose responsive to public demand and need, and on page 25 of the "Report of the Commission on Oral Argument" dated June 1, 1959, it was stated:

"We find, in No. MC-116067, that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment. (1) between Omaha, Neb., and Chicago, Ill., (a) from Omaha over Alternate U. S.

Highway 30 to junction U. S. Highway 30 at or near Missouri Valley, Iowa, thence over U. S. Highway 30 to Junction Illinois Highway 65 at or near Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, thence over U. S. Highway 34 to Chicago, and return over the same route, and (b) from Omaha over U. S. Highway 6 to junction U. S. Highway 66 near Joliet, Ill., thence over U. S. Highway 66 to Chicago, and return over the same route, and (2) between Omaha and St. Louis Mo., from Omaha over U. S. Highway 275 to junction U. S. Highway 34 at or near Glenwood, Iowa, thence over U. S. Highway 34 to Kansas City, Mo., thence over U. S. Highway 40 to St. Louis, and return over the same route, serving no intermediate points on routes (1)(a) and (1)(b), and serving the intermediate point of Kansas City on route (2), restricted, in each instance, to traffic originating at or destined to points in Nebraska; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act [fol. 134] and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, subject to the condition that the stockholder-carriers controlling applicant shall first obtain our approval of such control under the provisions of section 5 of the Interstate Commerce Act; and that in all other respects the application should be denied."

(b) that the public could not be served as well by existing carriers;

(c) that the public can be served under the proposed service without impairing the operations of existing carriers contrary to public interest;

(d) that existing carriers were not providing adequate service to the public between points granted to Nebraska Short Line Carriers, Inc., as stated in the Order of the Interstate Commerce Commission dated June 1, 1959; and

(e) that the Order of the Interstate Commerce Commission dated June 1, 1959, is not based upon an attempt to

adjudicate any labor dispute or controversy and at page 22 of the "Report of the Commission on Oral Argument", it is stated:

"We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act."

V.

Deny all other allegations of plaintiff's Complaint not hereinbefore expressly admitted.

Wherefore, Nebraska Short Line Carriers, Inc., intervenor-defendant, respectfully prays:

(1) That the order of the Interstate Commerce Commission in the proceeding entitled "Nebraska Short Line Carriers, Inc.,—Common Carrier Application, Docket No. [fol. 135] MC-116067", be affirmed and that the Complaint of plaintiff be dismissed; and

(2) That the intervening defendant, Nebraska Short Line Carriers, Inc., have such other and further relief in the premises as this Court may deem fitting, proper and appropriate.

Dated June 27, 1960.

Nebraska Short Line Carriers, Inc., a corporation,
By J. Max Harding, One of its Attorneys.

Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; James S. Dixon, Peoria, Illinois, Attorneys for Applicant for Intervention.

[fol. 136]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., a corporation, Plaintiffs,

—vs.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION—Filed July 15, 1960

The United States of America and the Interstate Commerce Commission, defendants in this action, answer the complaint as follows:

I.

Admit the allegations contained in paragraphs 1 and 2 of the complaint.

II.

Answering the allegations contained in paragraphs 3 and 4 of the complaint, respectfully refer the Court to the applications for motor carrier authority filed with the Commission by Nebraska Short Line Carriers, Inc., to the recommended reports and orders of the Examiner (Exhibits A and B attached to the complaint), and to the report [fol. 137] and order of the Commission (Exhibit C attached to the complaint), referred to in said paragraphs, for the complete and accurate contents thereof.

III.

Admit the allegations contained in paragraph 5 of the complaint.

IV.

Admit the allegations contained in paragraph 6 of the complaint, but respectfully refer the Court to the Commission's order of June 1, 1959, referred to in said paragraph, and the Commission's accompanying report for the complete and accurate contents thereof. (Exhibit C attached to the complaint).

V.

Admit the allegations contained in paragraph 7 of the complaint.

VI.

Deny the allegations contained in paragraph 8 of the complaint.

VII.

Answering the allegations of paragraph 9 of the complaint, respectfully refer the Court to section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)) for the complete and accurate text of said section.

[fol. 138]

VIII.

Deny the allegations contained in paragraphs 10, 11, 12, and 13 of the complaint.

IX.

Deny the allegations contained in paragraph 14 of the complaint, except admit that the plaintiff generally maintained normal interline relationships with other motor carriers during the period of the labor dispute referred to in said paragraph.

X.

Deny the allegations contained in paragraph 15 of the complaint.

XI.

Answering the allegations contained in paragraph 16 of the complaint, the defendants, because of lack of sufficient knowledge and information, are unable either to admit or deny said allegations.

XII.

Answering the allegations contained in paragraphs 17 and 18 of the complaint, admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of [fol. 139] the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the national transportation policy.

XIII.

Answering the allegations contained in paragraph 19 of the complaint, respectfully refer the Court to section 212 of the Interstate Commerce Act (49 U.S.C. 312) for the complete and accurate text of said section, and admit that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but allege that said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

XIV.

Answering the allegations contained in paragraph 20 of the complaint, admit that plaintiff is authorized to and [fol. 140] does perform motor carrier operations between the points specified in said paragraph, but allege that the evidence adduced before the Commission in Docket No. MC-116067, the proceeding under review, established that the present and future convenience and necessity required operation by the applicant, Nebraska Short Line Carriers, Inc., as a common carrier by motor vehicle, between the points and to the extent set forth in the Commission's report of June 1, 1959 (Exhibit C attached to the complaint).

XV.

Deny the allegations contained in paragraphs 21 and 22 of the complaint, and in further answer to said allegations respectfully refer the Court to the Commission's report and order of June 1, 1959 (Exhibit C attached to the Complaint), for the complete and accurate reasons and basis for the grant of the common carrier application of Nebraska Short Line Carriers, Inc. in Docket No. MC-116067.

XVI.

For further answer to the allegations of the complaint, deny that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint, or for any other reason whatsoever; and aver that said orders are in all respects valid.

[fol. 141]

XVII.

Except as herein expressly admitted, the defendants deny each and every allegation contained in the complaint.

Wherefore, the United States and the Commission pray that the relief prayed for in the complaint be denied, and that the complaint be dismissed.

Robert A. Bicks, Acting Assistant Attorney General; Harlington Wood, Jr., United States Attorney, Springfield, Illinois; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel; I. K. Hay, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for defendant Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 142] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., a corporation, Plaintiffs,

—v.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF
WATSON BROS. TRANSPORTATION CO., INC., ET AL.—Filed
August 5, 1960

Come now the United States of America and the Interstate Commerce Commission, defendants in this action, and for answer to the Intervening Complaint of Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc. say:

I.

Admit the allegations contained in paragraphs 1 and 2 of the complaint.

II.

Answering the allegations contained in paragraphs 3 to 10, inclusive, of the complaint, admit that the interveners named therein are motor carriers under certificates of [fol. 143] public convenience and necessity issued by the Commission between the points specified in the respective certificates held by them.

III.

Answering the allegations contained in paragraph 11 of the complaint, respectfully refer the Court to the applications for motor carrier authority filed with the Commission by Nebraska Short Line Carriers, Inc., to the recommended reports and orders of the Examiners, and to the report and order of the Commission (Exhibits A, B, and C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.) for the complete and accurate contents thereof.

IV.

Admit the allegations contained in paragraphs 12 and 13 of the complaint.

V.

Admit the allegations contained in paragraph 14 of the complaint, but respectfully refer the Court to the Commission's order of June 1, 1959, and the Commission's accompanying report for the complete and accurate contents thereof. (Exhibit C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.)

VI.

Admit the allegations contained in paragraph 15 of the complaint.

VII.

Deny the allegations contained in paragraph 16 of the complaint, except respectfully refer the Court to section [fol. 144] 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)), referred to in said paragraph, for the complete and accurate text of said section.

VIII.

Deny the allegations contained in paragraphs 17, 18, and 19 of the complaint, but with respect to the Commission's findings, referred to in said paragraph, respectfully refer the Court to the Commission's report (Exhibit C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.) for the complete and accurate findings made by the Commission.

IX.

Deny the allegations contained in paragraphs 20 and 21 of the complaint, except respectfully refer the Court to the Examiners' reports referred to therein (Exhibits A and B attached to the complaint of the plaintiff Burlington Truck Lines, Inc.) for the complete and accurate findings of the Examiners.

X.

Answering the allegations contained in paragraph 22 of the complaint, the defendants, because of lack of sufficient knowledge and information, are unable either to admit or deny said allegations.

XI.

Answering the allegations contained in paragraph 23, of the complaint, admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations [fol. 145] affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has

jurisdiction over, the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the national transportation policy; and respectfully refer the Court to section 212 of the Interstate Commerce Act (49 U.S.C. 312) for the complete and accurate text of said section, and admit that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but allege that said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

XII.

Answering the allegations contained in paragraph 24 of the complaint, admit that the motor carriers named therein are authorized to, and do perform, motor carrier operations between the points specified in the respective certificates of [fol. 146] public convenience and necessity issued to them by the Commission, but allege that the proceeding under review established that the present and future public convenience and necessity required operation by the applicant, Nebraska Short Line Carriers, Inc., as a common carrier by motor vehicle, between the points and to the extent set forth in the Commission's report of June 1, 1959 (Exhibit C attached to the complaint) of the plaintiff Burlington Truck Lines, Inc.).

XIII.

Deny the allegations contained in paragraph 25 of the complaint, and in further answer to said allegations respectfully refer the Court to the Commission's report and order of June 1, 1959 (Exhibit C attached to the Complaint of the plaintiff Burlington Truck Lines, Inc.) for the com-

plete and accurate reasons and basis for the grant of the common carrier applications of Nebraska Short Line Carriers, Inc., in Docket No. MC-116067.

XIV.

Deny the allegations contained in paragraph 26 of the complaint.

XV.

For further answer to the allegations of the complaint, deny that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint, or for any other reason whatsoever; and aver that said orders are in all respects valid.

XVI.

Except as herein expressly admitted, the defendants deny each and every allegation contained in the complaint.

[fol. 147] Wherefore, the United States and the Commission pray that the relief prayed for in the complaint be denied, and that the complaint be dismissed.

Robert A. Bicks, Assistant Attorney General;
Harlington Wood, Jr., United States Attorney,
Springfield, Illinois; John H. D. Wigger, Attorney,
ney, Department of Justice, Washington 25, D. C.,
Attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel; I. K. Hay,
Associate General Counsel, Interstate Commerce
Commission, Washington 25, D. C., Attorneys for
defendant Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 148] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., a corporation, Plaintiffs,

—v.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF
SANTA FE TRAIL TRANSPORTATION COMPANY—Filed Au-
gust 5, 1960

Come now the United States of America and the Inter-
state Commerce Commission, defendants in this action, and
for answer to the Intervening Complaint of Santa Fe Trail
Transportation Company say:

I.

Admit the allegations contained in paragraphs 1, 2 and
3 of the complaint.

II.

Answering the allegations contained in paragraph 4 of
the complaint, respectfully refer the Court to the appli-
cations for motor carrier authority filed with the Com-
mission by Nebraska Short Line Carriers, Inc., to the
recommended reports and orders of the Examiner, and to
the report and order of the Commission (Exhibits A, B
[fol. 149] and C attached to the complaint of the plaintiff
Burlington Truck Lines, Inc.) for the complete and accu-
rate contents thereof.

III.

Admit the allegations contained in paragraph 5 of the complaint.

IV.

Admit the allegations contained in paragraph 6 of the complaint, but respectfully refer the Court to the Commission's order of June 1, 1959, and the Commission's accompanying report for the complete and accurate contents thereof. (Exhibit C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.)

V.

Admit the allegations contained in paragraph 7 of the complaint.

VI.

Deny the allegations contained in paragraph 8 of the complaint, except respectfully refer the Court to section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)), referred to in said paragraph, for the complete and accurate text of said section.

VII.

Deny the allegations contained in paragraphs 9, 10 and 11 of the complaint, but with respect to the Commission's findings, referred to in said paragraph, respectfully refer the Court to the Commission's report (Exhibit C attached [fol. 150] to the complaint of the plaintiff Burlington Truck Lines, Inc.) for the complete and accurate findings made by the Commission.

VIII.

Deny the allegations contained in paragraphs 12 and 13 of the complaint except respectfully refer the Court to the Examiners' report referred to therein (Exhibits A and B attached to the complaint of the plaintiff Burlington Truck Lines, Inc.) for the complete and accurate findings of the Examiners.

IX.

Answering the allegations contained in paragraph 14 of the complaint, the defendants, because of lack of sufficient knowledge and information, are unable either to admit or deny said allegations.

X.

Answering the allegations contained in paragraph 15 of the complaint, admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, [fol. 151] the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the national transportation policy; and respectfully refer the Court to section 212 of the Interstate Commerce Act (49 U.S.C. 312) for the complete and accurate text of said section, and admit that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but allege that said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

XI.

Answering the allegations contained in paragraph 16 of the complaint admit that Santa Fe Trail Transportation Company is authorized to, and does perform, motor carrier

operations between the points specified in the certificates of public convenience and necessity issued to it by the Commission, but allege that the evidence adduced before the Commission in Docket No. MC-116067, the proceeding under review, established that the present and future public convenience and necessity required operation by the applicant, Nebraska Short Line Carriers, Inc., as a common carrier by motor vehicle, between the points and to the extent set forth in the Commission's report of June 1, 1959 (Exhibit C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.).

[fol. 152]

XII.

Deny the allegations contained in paragraphs 17 and 18 of the complaint, and in further answer to said allegations respectfully refer the Court to the Commission's report and order of June 1, 1959 (Exhibit C attached to the Complaint of the plaintiff Burlington Truck Lines, Inc.) for the complete and accurate reasons and basis for the grant of the common carrier application of Nebraska Short Line Carriers, Inc. in Docket No. MC-116067.

XIII.

For further answer to the allegations of the complaint, deny that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint, or for any other reason whatsoever; and aver that said orders are in all respects valid.

XIV.

Except as herein expressly admitted, the defendants deny each and every allegation contained in the complaint.

Wherefore, the United States and the Commission pray that the relief prayed for in the complaint be denied, and that the complaint be dismissed.

Robert A. Bicks, Assistant Attorney General;
Harlington Wood, Jr., United States Attorney,
Springfield, Illinois; John H. D. Wigger, Attorney,
ney, Department of Justice, Washington 25, D. C.,
Attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel; I. K. Hay,
Associate General Counsel, Interstate Commerce
Commission, Washington 25, D. C., Attorneys for
defendant Interstate Commerce Commission.

[fol. 153] Certificate of Service (omitted in printing).

[fol. 154] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants

and

SANTA FE TRAIL TRANSPORTATION
COMPANY, Plaintiff-Intervener

and

WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANS-
FER CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDE-
PENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS,
INC., INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT
LINES, INC., and RINGSBY TRUCK LINES, INC., Plaintiff-
Interveners

and

GENERAL DRIVERS AND HELPERS UNION, Local 554, affiliated
with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Plaintiff-Intervener

MOTION TO INTERVENE AS PLAINTIFF—
Filed October 24, 1960

Comes now the General Drivers and Helpers Union, Local 554, of Omaha, Nebraska affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and moves for leave to intervene as a plaintiff in order to assert the claim set forth in its proposed complaint of which a copy is hereto attached, on the ground that the applicant was a party in interest to the proceedings before the Interstate Commerce Commission in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067; Sub 2, and *Nebraska Short Line Carriers, [fol. 155] Inc., Common Carrier Application*, Docket No. MC-116067, and is therefore permitted to intervene as of right under the provisions of 28 U.S.C.A. Section 2323, and under the provisions of Rule 24 (a) ((1)), Federal Rules of Civil Procedure.

David D. Weinberg and Arnold J. Stern, Attorneys
for General Drivers and Helpers Union, Local 554,
Applicant for Intervention, 300 Keeline Building,
Omaha, Nebraska.

Dated: October 18, 1960.

[fol. 156] Certificate of Service (omitted in printing).

[fol. 157]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants

and

SANTA FE TRAIL TRANSPORTATION
COMPANY, Plaintiff-Intervener

and

WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANS-
FER CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDE-
PENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS,
INC., INTERSTATE MOTOR LINES, INC., and RINGSBY TRUCK
LINES, INC., Plaintiff-Interveners

and

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, affiliated
with the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
Plaintiff-Intervener

COMPLAINT OF INTERVENER GENERAL DRIVERS AND HELPERS
UNION, LOCAL 554, affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF AMERICA—Filed October 24, 1960

Comes now General Drivers and Helpers Union, Local
554, of Omaha, Nebraska, affiliated with the International
Brotherhood of Teamsters, Chauffeurs, Warehousemen and
Helpers of America, by their attorneys, David D. Wein-

berg and Arnold J. Stern, and file this, in Complaint, for [fol. 158] the purpose of seeking the issuance of interlocutory and permanent injunctions against the United States of America and the Interstate Commerce Commission and their officers and agents, restraining the enforcement of the Orders of the Interstate Commerce Commission in the proceeding entitled "*Nebraska Short Line Carriers, Inc., Common Carrier Application, Docket Number MC-116067*", and in support thereof states as follows:

1. That it re-alleges Paragraphs 1 and 2 of the Complaint heretofore filed by Burlington Truck Lines, Inc.

2. That General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, whose principal place of business is located at Omaha, Nebraska, is a labor organization organized for the purpose of representing employees in collective bargaining, with respect to wages, hours and conditions of employment, and as such, represents for purposes of collective bargaining, employees of the Plaintiff, Burlington Truck Lines, Inc., and numerous other common carriers by motor vehicle in Nebraska, and other states, which common carriers are subject to the jurisdiction of the Interstate Commerce Commission pursuant to the Interstate Commerce Act.

3. That it re-alleges Paragraphs 3 and 4 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines Inc.

4. That the applications of Nebraska Short Line Carriers, Inc., referred to above, were opposed before the Interstate Commerce Commission by this Plaintiff-Intervener, and eighteen motor carriers, as well as certain rail carriers.

5. That it re-alleges Paragraphs 6 and 7 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines, Inc.

6. That in granting a permanent certificate to Nebraska Short Line Carriers, Inc., in Docket No. MC-116067, based upon a temporary condition, the Interstate Commerce Com-

mission misconceived the purpose and intention of Congress in Section 207(a) of the Interstate Commerce Act [fol. 159] which authorizes the granting of a certificate based upon a permanent state of facts, and not predicated upon a transitory premise.

7. That by an order dated March 10, 1960, the Interstate Commerce Commission, a defendant herein, denied the petitions for reconsideration and/or further hearing which had been filed by certain protesting carriers, including the petition for reconsideration and/or further hearing of Watson Bros. Transportation Co., Inc., filed August 7, 1959; the petition of Red Ball Transfer Co. to stay the order of the Commission and to reopen the proceeding for further hearing, filed July 6, 1959; the petition of Prucka Transportation, Inc., for reconsideration and/or further hearing, dated August 7, 1959, and the petition of Independent Truckers, Inc., for reconsideration and/or further hearing, dated August 7, 1959.

8. That it realleges Paragraphs 8, 9 and 10 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines, Inc.

9. That it realleges Paragraph 12 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines, Inc.

10. That Section 212 of the Interstate Commerce Act (49 U.S.C. Section 312) provides for the filing of Complaints against interstate motor carriers who wilfully breach their duty to provide interstate motor carrier service to the public; that said Complaint Section is the only remedy provided by said Act for wilful breaches of duty by interstate carriers, and that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty to existing carriers alleged to have violated their duty to the public; and certainly not as a penalty against plaintiff and other protesting carriers who have steadfastly discharged their motor common carrier services under their certificates, and provided uninterrupted, satisfactory and adequate services.

11. That the labor dispute which caused the temporary deficiencies in service of some carriers was settled by April 4, 1957, when the hearing in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067, Sub 2, was held, and there- [fol. 160] fore, the issues raised had already become moot; and although the Interstate Commerce Commission had granted authority to Nebraska Short Line Carriers, Inc., to temporarily operate for the purpose of relieving against the alleged deficiencies in service, the Examiner, in *Nebraska Short Line Carriers, Inc.*, Docket No. MC-116067, Sub 2 (Exhibit B to plaintiff's Complaint) specifically found that by April 3, 1957, Watson Bros. Transportation Co., Inc.; Prucka Transportation, Inc.; and Independent Truckers, Inc., among others, were providing normal service for all shippers and carriers in the area involved. In addition, the Examiner found that other carriers, including carrier interveners, have always been willing to provide service for all shippers and carriers in the area involved.

12. That it re-alleges Paragraph 15 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines, Inc.

13. Plaintiff-Intervener further alleges that since the decision of the Interstate Commerce Commission in the above described cause, Congress has passed the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Statute 519 et seq.; that in the hearings before a trial examiner of the Interstate Commerce Commission, Nebraska Short Line Carriers, Inc., admitted on the record that, in the event the "hot cargo clause" contained in collective bargaining agreements between this Plaintiff-Intervener and motor carriers in this area was eliminated from such collective bargaining agreements, it would voluntarily relinquish any authority granted by the Commission as requested in its applications before the Interstate Commerce Commission; that since the decisions by the Interstate Commerce Commission, Section 704 (b) (c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 158, 73 Statute 543, has been passed by Congress, eliminating as illegal such "hot cargo clauses" and has declared such clauses unenforceable and void;

that Nebraska Short Line Carriers, Inc., based its requests for rights in the above designated applications before the Interstate Commerce Commission on the existence of such a clause in the collective bargaining agreements between Plaintiff-Intervener and numerous motor carriers in this [fol. 161] area. Plaintiff-Intervener further alleges that because of this fact, the Orders of the Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, should be declared unlawful, null and void.

14. That it realleges Paragraphs 17, 18 and 19 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines, Inc.

15. That unless the Orders of the Interstate Commerce Commission granting Nebraska Short Line Carriers, Inc., authority to operate as a result of the organizational and employee representation activities of the International Brotherhood of Teamsters, are enjoined and otherwise made null and void, Interveners stand to lose valuable rights pursuant to their collective bargaining agreements and such results affect the collective bargaining status of Plaintiff-Intervenor and its members; that the determination made by the Interstate Commerce Commission in the above causes vitally affect the interests of Plaintiff-Intervenor and its members.

16. Plaintiff-Intervener further alleges that the basis for the granting of the applications of Nebraska Short Line Carriers, Inc., was a temporary labor dispute, which matters are within the exclusive jurisdiction of the National Labor Relations Board and beyond the jurisdiction of the Interstate Commerce Commission pursuant to the Interstate Commerce Act and all acts amendatory thereof; that the power of the Interstate Commerce Commission to issue motor carrier certificates as a means to circumvent labor disputes not only exceeds its statutory power, but is contrary to the policy of Congress.

17. That it realleges Paragraph 22 of the Complaint heretofore filed by Plaintiff, Burlington Truck Lines, Inc.

18. Plaintiff-Intervener further alleges that unless the Orders of the Interstate Commerce Commission granting

Nebraska Short Line Carriers, Inc., authority to operate, are enjoined and otherwise made null and void, Plaintiff-Intervener and its members ability to maintain a decent standard of working conditions for its members and other employees in the motor carrier industry will be greatly diminished and its ability to secure better working conditions in such industry will be measurably curtailed and hindered.

Wherefore, Plaintiff-Intervener respectfully prays:

(1) That the presiding judge of this Court shall call to his assistance in the hearing and determination thereof, two other judges of whom at least one shall be a Circuit Judge, and the Court thus constituted and convened shall hear this Complaint upon due and legal notice to the defendants in accordance with the provisions of 28 U.S.C. 2284 and 2321 to 2325;

(2) That upon final hearing of this case, the Court enter a decree which shall adjudge the orders of the Interstate Commerce Commission entered June 1, 1949 and March 10, 1960, in the matter of *Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC-116067, to have been entered in violation of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, and, therefore, that they are unlawful, null and void; and

(3) That the Court grant such other and further relief in the premises as it may deem fitting and appropriate.

Dated: October 18, 1960.

General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Intervener, By David D. Weinberg and Arnold J. Stern, 300 Keeline Bldg., Omaha 2, Nebraska, Their attorneys.

David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha 2, Nebraska, 341-2250.

[fol. 163]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Court met pursuant to adjournment

Present, the Honorable Frederick O. Mercer, Judge

(Mercer, J.)

Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation,

and

SANTA FE TRAIL TRANSPORTATION Co., Plaintiff-Intervener,

and

WATSON BROS. TRANSPORTATION Co., INC., RED BALL TRANSFER Co., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES, INC., and RINGSBY TRUCK LINES, INC., Plaintiff-Interveners,

—vs.—

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

and

NEBRASKA SHORT LINE CARRIERS, INC.,
Defendant-Intervener.

ORDER GRANTING GENERAL DRIVERS & HELPERS UNION,
LOCAL 554, ETC. LEAVE TO INTERVENE—October 24, 1960

And now on this 24th day of October, A. D. 1960, comes the plaintiff herein by James A. Gillen, Russell B. James,

James M. Adams and Axelrod, Goodman & Steiner (by David Axelrod) its attorneys, and comes also the plaintiff-intervener, Santa Fe Trail Transportation Co., by Starr Thomas & Roland J. Lehman, its attorneys, and come also the plaintiff-interveners, Watson Bros. Transportation Co., Inc., Red Bull Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., by Axelrod, Goodman & Steiner (by David Axelrod) their attorneys, and comes also the defendant, Interstate Commerce Commission, by Robert Ginnane, General Counsel, Interstate Commerce Commission, and Isaac K. Hay, Associate General Counsel, Interstate Commerce Commission, its attorneys, and comes also the defendant, United States of [fol. 164] America, by Harlington Wood, Jr., United States Attorney for the Southern District of Illinois, and comes also the defendant-intervener by Nelson, Harding & Aekle and James S. Dixon, its attorneys, and comes also General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, plaintiff-intervener, by David D. Weinberg and Arnold J. Stern, its attorneys. This cause comes on for hearing on motion by General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, for leave to intervene as party plaintiff. It is ordered by the Court that said motion be and is hereby allowed and Complaint of Intervener is hereby filed.

By agreement of all parties, it is ordered by the Court that the hearing be continued from October 27, 1960, to December 16, 1960, at 10:00 o'clock a. m.

It is further ordered by the Court that plaintiff and intervening petitioners file written Briefs within a period of twenty (20) days from this date; defendants to file answering Briefs within a period of fifteen days (15) after receipt of plaintiffs' Briefs, and that plaintiff and intervening petitioners file reply Briefs within five (5) days after receipt of answering Briefs. It is further ordered by the court that copies of Briefs filed by respective parties be given to opposing parties within periods herein set forth.

[fol. 165]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., Plaintiff,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT
OF GENERAL DRIVERS AND HELPERS UNION LOCAL 554,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, INTERVENER—Filed November 30, 1960

Come now the United States of America and the Inter-
state Commerce Commission, defendants in this action, and
for answer to the Intervening Complaint of General Drivers
and Helpers Union Local 554, affiliated with the Inter-
national Brotherhood of Teamsters, Chauffeurs, Ware-
housemen and Helpers of America, say:

I.

Admit the allegations contained in paragraphs 1 and 2
of the complaint.

II.

Answering the allegations contained in paragraph 3 of
the complaint, respectfully refer the Court to the applica-
tions for motor carrier authority filed with the Commission
[fol. 166] by Nebraska Short Line Carriers, Inc., to the
recommended reports and orders of the Examiners, and
to the report and order of the Commission. (Exhibits A,

B and C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.), for the complete and accurate contents thereof.

III.

Admit the allegations contained in paragraph 4 of the complaint.

IV.

Admit the allegations contained in paragraph 5 of the complaint, but respectfully refer the Court to the Commission's order of June 1, 1959, and the Commission's accompanying report for the complete and accurate contents thereof. (Exhibit C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.)

V.

Deny the allegations contained in paragraph 6 of the complaint.

VI.

Admit the allegations contained in paragraph 7 of the complaint.

VII.

Deny the allegations contained in paragraph 8 of the complaint, except with respect to section 207(a) of the Interstate Commerce Act (49 U.S.C.A. 307(a)), respectfully refer the Court to said section for its complete and accurate text.

[fol. 167]

VIII.

Deny the allegations contained in paragraph 9 of the complaint.

IX.

Answering the allegations contained in paragraph 10 of the complaint, respectfully refer the Court to section 212 of the Interstate Commerce Act (49 U.S.C.A. 312) for the complete and accurate text of said section, and admit that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but allege that said Act does provide for the issuance of such certificates when

the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

X.

Answering the allegation contained in paragraph 11 of the complaint respectfully refer the Court to the Examiners' reports and the report of the Commission (Exhibits A, B and C attached to the complaint of the plaintiff Burlington Truck Lines, Inc.) for a true and accurate statement of the facts.

XI.

Deny the allegations contained in paragraph 12 of the complaint.

XII.

Answering the allegations contained in paragraph 13 of the complaint, admit that Congress passed the Labor Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Statute 519 et seq. since the Commission ren-[fol. 168] dered its decision and issued its report and order of June 1, 1959, in the proceeding here under review, but respectfully refer the Court to the text of said Act for its true import and effect; and deny the remaining allegations of said paragraph.

XIII.

Answering the allegations contained in paragraph 14 of the complaint, admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common carriers in relation to their obligations to the public under the Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the ser-

vice available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the national transportation policy; and admit that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but allege that said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

[fol. 169]

XIV.

Deny the allegations contained in paragraphs 15, 16, 17 and 18 of the complaint.

XV.

For further answer to the allegations of the complaint, deny that the orders of the Commission challenged in this action are unlawful for the reasons specified in the complaint, or for any other reasons whatsoever; and aver that said orders are in all respects valid.

XVI.

Except as herein expressly admitted, the defendants deny each and every allegation contained in the complaint.

Wherefore, the United States and the Commission pray that the relief prayed for in the complaint be denied, and that the complaint be dismissed.

Robert A. Bicks, Assistant Attorney General;
Harlington Wood, Jr., United States Attorney,
Springfield, Illinois;
John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.,
Attorneys for defendant United States of America.
Robert W. Ginnane, General Counsel; I. K. Hay,
Associate General Counsel, Interstate Commerce
Commission, Washington 25, D. C., Attorneys for
defendant Interstate Commerce Commission.

[fol. 170] Certificate of Service (omitted in printing).

[fol. 171]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Present, the Honorable J. Earl Major, United States
Circuit Judge; Present, the Honorable Frederick O. Mercer,
Judge; Present, the Honorable Omer Poos, Judge.

(Major, J.)
(Mercer, J.)
(Poos, J.)

Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., a Corporation,
and

SANTA FE TRAIL TRANSPORTATION Co., Plaintiff-Intervener,
and

GENERAL DRIVERS & HELPERS UNION, LOCAL 554; WATSON
BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER CO.,
INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT
TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., IN-
TERSTATE MOTOR LINES, INC., and NAVAJO FREIGHT LINES,
INC. and RINGSBY TRUCK LINES, INC., Plaintiff-Inter-
veners,

—vs.—

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

and

NEBRASKA SHORT LINE CARRIERS, INC.,
Defendant-Intervener.

ORDER REGARDING HEARING BY THREE-JUDGE COURT—
Entered December 16, 1960

And now on this 16th day of December, A. D. 1960, comes the plaintiff, Burlington Truck Lines, Inc., a Corporation, and come also Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., plaintiff-interveners, by Axelrod, Goodman & Steiner (by David Axelrod) their attorneys, and [fol. 172] comes also General Drivers & Helpers Union, Local 554, plaintiff-intervener, by David D. Weinberg, Arnold J. Stern and Lowell R. McConnell, its attorneys, and comes also the defendant, Interstate Commerce Commission, by Isaac K. Hay, Associate General Counsel, its attorney, and comes also the defendant, United States of America, by Harlington Wood, Jr., United States Attorney for the Southern District of Illinois, by John M. Daugherty, Assistant United States Attorney, and comes also Nebraska Short Line Carriers, Inc., defendant-intervener, by Nelson, Harding & Aeklie (by Duane Aeklie and J. Max Harding) and James S. Dixon, its attorneys, and this cause comes on for hearing on a Three-Judge Court for issuance of interlocutory and permanent injunctions against the defendants from orders of the Interstate Commerce Commission.

Comes now Lowell R. McConnell and moves the court for leave to enter his appearance as counsel for the plaintiff-intervener, General Drivers & Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. It is ordered by the Court that said motion be and is hereby allowed. Comes now James S. Dixon and moves the court for leave to enter his appearance as counsel for the defendant-intervener, Nebraska Short Line Carriers, Inc. It is ordered by the Court that said motion be and is hereby allowed. By agreement of all counsel, it is ordered by the Court that each side be allotted One and one-half hours for arguments.

Comes now John M. Daugherty, Assistant United States Attorney and moves the court that Isaac K. Hay be allowed to participate in this matter on behalf of the Interstate Commerce Commission. It is ordered by the court that said motion be and is hereby allowed. John M. Daugherty, Assistant United States Attorney, informs the Court that he concurs with the arguments of Isaac K. Hay, counsel for the Interstate Commerce Commission.

After hearing the arguments of counsel, it is ordered by the Court that this cause be and is hereby taken under advisement.

[fol. 1]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-116067

In the Matter of the Application
of

NEBRASKA SHORT LINE CARRIERS, INC., Lincoln, Nebraska.
Common Carrier. Regular Routes.

General commodities: Denver-Chicago; Minneapolis-Des Moines; Council Bluffs-St. Louis; Lincoln-St. Joseph.

Transcript of Hearing—January 28, 1957

Federal Court Room,
United States Postoffice
Building,
Lincoln, Nebraska.

Met, pursuant to notice, at 9:30 a. m.

Before: Donald R. Sutherland, Examiner.

APPEARANCES:

J. Max Harding, Attorney at Law, 901 South 13th Street, Lincoln, Nebraska, and

R. E. Powell, Attorney at Law, 1005-1006 Trust Building, Lincoln, Nebraska, and _____

W. F. Manasil, Attorney at Law, Burwell, Nebraska, appearing for applicant.

J. R. Rose, Attorney at Law, Jefferson City, Missouri, appearing for Churchill Truck Lines, Inc., protestant.

[fol. 2] William P. Higgins, Attorney, Union Pacific Railroad Company, 1416 Dodge Street, Omaha, Nebraska, appearing for Class I Railroads in Western Trunk Line Territory, protestants.

Earl J. Brooks, 299 Adeline Street, Oakland, California, appearing for Pacific Intermountain Express, protestant.

Truman A. Stockton, Jr., Attorney at Law, The 1650 Grant Street Building, Denver 3, Colorado, appearing for Illinois-California Express, Inc., Interstate Motor Lines, Inc., and Ringsby Truck Lines, Inc., protestants.

Homer E. Bradshaw, Attorney at Law, 510 Central National Building, Des Moines, Iowa, appearing for Bruce Motor Freight, Inc., and Brady Motor Freight, protestants.

J. B. Reeves, Attorney, The Atchison, Topeka & Santa Fe Railway General Office Building, Topeka, Kansas, appearing for The Santa Fe Trail Transportation Company, protestant.

Guy C. Chambers, Attorney at Law, 850 Stuart Building, Lincoln, Nebraska, appearing for Rock Island Motor Transit, protestant.

Jack Goodman, Attorney at Law, 39 South LaSalle Street, Chicago, Illinois, appearing for Watson Bros. Transportation Co., Inc., Union Freightways, Red Ball Transfer Company, and others, protestants.

S. F. Pavelec, 4684 Leavenworth Street, Omaha, Nebraska, appearing for Independent Truckers, Inc., protestant.

David D. Weinberg, Attorney at Law, 600 Keeline Building, [fol. 3] ing, Omaha, Nebraska, appearing for International

Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 554, intervenor and protestant.

[fol. 12] JOHN JACK ROMANS was sworn and testified as follows:

Direct examination.

By Mr. Harding:

Q. Please state your name and address, Mr. Romans.

A. John Jack Romans, Ord, Nebraska.

[fol. 18] Q. From your knowledge of the inception of this company, can you tell us the purpose of organizing the company?

A. The purpose of organizing this company was to enable us to be able to interline freight for our customers to various major shipping towns in the middlewest and also to the intermediate points along the routes that carriers that we had been usually interlining with were refusing to take and do business with us which denied our customers any service by motor truck from these towns to towns with which we serve.

[fol. 31] Q. And those are currently in full force and effect?

A. Yes.

Q. Will you have available later on in this hearing a witness who will testify specifically as to the amount and kind of insurance carried by the Company?

A. Yes.

Q. Now, Mr. Romans, I believe that you have already stated that you are a motor carrier yourself in your own right, is that so?

A. Yes.

Q. How long have you been engaged in business as a motor carrier?

A. Since 1940 as an individual and since 1931, along in between the period 1931 and 1941 along with my dad and brothers.

Q. Did your father originate that trucking business which you now operate?

A. Yes.

Q. Do you operate as a common carrier or contract carrier?

A. Common carrier.

Q. And do you operate over regular routes or irregular routes?

A. Over regular routes.

Q. Do you hold certain authority from the Interstate Commerce Commission authorizing you to conduct interstate operations over certain regular routes?

A. Yes.

[fol. 47] Q. And can you state for the record, Mr. Romans, the names of at least the major motor carriers with whom you conducted interchange operations?

A. I will start the list of these that I do interline clearing with through the United States National Bank in Omaha.

[fol. 48] Q. All right.

A. Arrow Freight Lines, Barber Transportation Company, Beatrice Motor Freight, Bos Truck Lines, Brady Motor Freight, Crouse Cartage Company, Des Moines Transportation Company, Haeccks Express, Highway Motor Freight, Inc., Independent Truckers, Inc., McMakin Transportation Company, Merchants Motor Freight, Prueka Transportation Co., Inc., Red Ball Transfer Company, Red Oak Transfer & Storage Company, Revell Transit Company, Transamerican Freight Lines, Inc., Union Transfer Company, Watson Bros. Transportation Co., Inc., Wilson Bros. Transfer & Storage Company. That's the ones that do business through the clearing house. Those that I can think of offhand that we do business with outside is Darling Transfer Company, Santa Fe Trails, Truck Division, Burlington Truck Lines, Rock Island

Motor Freight. There are some more. The fact of the matter is I know of none but what I did transfer freight with at some time or another.

[fol. 49] A. Yes.

Q. Are you a party to any tariff publishing bureau, Mr. Romans?

A. Yes.

Q. And what is the tariff bureau?

A. Middlewest Motor Freight Tariff Bureau.

Q. Can you tell us, Mr. Romans, the numbers of the tariffs in which you participate as an individual?

A. I think I can find that.

Q. You don't locate it right now?

A. I don't locate it right now but I do have it somewhere.

Q. Well, we'll get to that later then. Do you and have you executed concurrences on through rates and through routes with numerous of the carriers whom you mentioned?

A. Yes.

Q. As of the date of this hearing, this morning, have you received from any of those carriers any notice of cancellation of those through routing concurrence arrangements?

A. No.

[fol. 70] Q. Since May 7 of 1956, have you been able to conduct normal interchange operations with any of your previous interline connecting carriers?

A. No.

Q. Has your rejection of this interchange freight continued after December 15, 1956?

A. With most companies.

Mr. Goodman: What was the question?

Exam. Sutherland: Read the question, please.

(Question read.)

By Mr. Harding:

Q. Will you explain your answer, Mr. Romans?

A. As of late, the last few months, Burlington Truck

Lines and Santa Fe Truck Line, Trails Company, whatever it is, has been doing interline business with me. As to—

Mr. Weinberg: Would you read that answer, please?

(Answer read.)

A. —as to the carriers of Watson Bros. Transportation Co., Inc., Buckingham, Darling, Des Moines Transportation Company, Haack's Express, Independent Truckers, Inc., Iowa-Nebraska Transportation Company, Merchants Motor Freight, Prucka Transportation Company, Red Ball Transportation Company, Transamerican Freight Lines, Watson Bros. Transportation Co., Inc., Wilson Truck System, and any others, they still refuse to interline freight with me as [fol. 71] of yet, last Friday.

Q. And does that refer to both inbound and outbound tonnage?

A. It refers to all inbound but some of them will accept freight sometimes and we never know in advance when we have shipments going out, some times we might go to their docks and they will accept freight and the next time you go up with the similar kind of shipments going to the same points and they refuse. It seems to be more or less how they are feeling that day or something.

[fol. 152] W. FOY CLARK was sworn and testified as follows:

Direct examination.

By Mr. Harding:

Q. Will you state your name and address, please?

A. W. Foy Clark, 601 South Third Street, Norfolk, Nebraska.

Q. What is your present occupation or business, Mr. Clark?

A. Co-partner in the Clark Bros. Transfer Company, Norfolk, Nebraska.

Q. Are you also associated with the applicant corporation in any respect?

A. I am an original incorporator, a stockholder and an officer.

Q. What office do you hold with the corporation?

A. Secretary.

Q. Are you also on the Board of Directors?

A. Yes, sir.

[fol. 160] Q. Can you state for the record the names of the motor carriers with whom you have interchanged interstate traffic?

Mr. Brooks: I will offer the same objection, as the freight bills would be the best evidence.

Exam. Sutherland: Objection overruled.

A. Barber Transportation Company, Bos. Truck Lines, Brady Motor Freight, Des Moines Transportation, Hackles Express, Independent Truckers, Burlington Truck Lines, Rock Island Motor Freight, Santa Fe Trails Transportation Company, Iowa-Nebraska Transportation, McMakin Transfer Company, Merchants Motor Freight, Prucka Transportation Company, Red Ball Transfer Company, Trans-
[fol. 161] american Freight Lines, Union Freightways, Watson Bros. Transportation Co., Inc., Wilson Storage & Transfer Company, Darling Transfer, Sturm Freightways. That's at least a partial list.

By Mr. Harding:

Q. There may be others?

A. There may be others.

Q. Is Clark Brothers a party to any tariff publication Bureau?

A. Middlewest Motor Freight Bureau, Kansas City.

Q. Can you give us the numbers of the tariff series in which you participate?

A. Tariffs Nos. 1, 2, 25, 26; commodities Nos. 52, 200, 201, 203, 204, 215, 1020, 1230, 1231 and 1232.

Q. In connection with the publication of those tariffs, have you executed concurrences for the interchange of

freight and through routes and through rates with numerous motor carriers?

A. We have.

Q. Do you know in which one of those tariff series the concurrences would be shown?

A. Tariff No. 200-C.

Q. Under these tariff publications, has Clark Brothers held out to serve, to handle interstate freight on a through rate, through routing basis?

A. We have.

[fol. 162] Q. Has your company had any difficulty in conducting interchange operations with these various motor carriers you mentioned?

Mr. Brooks: To which question objection is made for the reason it will not elicit any answer relevant to the issues in this case, the first being public convenience and necessity of the public and the second being the fitness and ability of the applicant.

[fol. 163] Exam. Sutherland: Objection overruled.

A. Yes, sir.

By Mr. Harding:

Q. What was the first thing that occurred, Mr. Clark?

A. The first cessation of interchange freight occurred on approximately September 14, a few days after September 14, at which time—

Q. Which year, please?

A: 1955.

[fol. 166] Q. Were you able to conduct the interchange operations with any of the motor carriers with whom you had previously conducted business?

A. Some of them for a period of time.

Q. Did those carriers deliver the freight to your terminal or did you deliver it to theirs?

A. We had no deliveries at our terminal. Any freight

which we destined for other carriers we delivered wherever possible and received no freight delivered at our terminal.

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[fol. 167] Q. Now, as a result of the filing of such complaint, was there any sort of compromise reached with your Company and the Local 554?

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A. On or about December 8, 1955, a settlement agreement was signed by Local 554, the National Labor Relations Board and Clark Brothers, and a notice of same posted on various docks and termini at Omaha, Nebraska.

By Mr. Harding:

Q. All right. Now, as a result of that settlement agreement which was executed, Mr. Clark, was there then any change in the interchange business with your interline carriers?

A. According to our tonnage and revenue records the [fol. 168] interline business was resumed with most, if not all, carriers.

Q. Those would be the same carriers you have previously enumerated here in the record?

A. Yes, sir.

Q. Did any of those carriers deliver merchandise to your terminal in Omaha after December 8, 1955?

A. No, sir.

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[fol. 171] By Mr. Harding:

Q. Now, subsequent to January 10, 1956, were you able to conduct a normal interchange operation with the interline carriers at Omaha, Nebraska?

A. According to our records there was a decided drop in our interline business after January 10, 1956. For other purposes I have drawn graphs showing, prepared from our records showing this to be a fact.

Q. Did this drop in interchange business occur all at once or did it vary?

A. It varies from carrier to carrier.

[fol. 172] By Mr. Harding:

Q. Now, Mr. Clark, from let's say February 1, 1956, for the period of the next four months were you able to do interchange business with any interline carriers in Omaha?

A. We did some interline business.

Q. And with what carriers?

A. From February 1 on?

Q. Yes, from February 1, 1956, on.

A. We did some interline business with Santa Fe Trail Transportation Company, we did some with Burlington Truck Lines, we did some with Wilson Storage & Transfer and without checking the records I would say no others.

Q. The carriers you mentioned there, were there any instances where shipments which you tendered to those carriers were refused or rejected?

A. Yes, sir.

Mr. Goodman: Are you speaking with reference to Santa Fe, Burlington and Wilson Storage & Transfer, now?

The Witness: Yes, sir.

[fol. 192] By Mr. Harding:

Q. Mr. Clark, are there any of these interlining carriers [fol. 193] whom you have enumerated who, since July 30, 1956, have completely refused to accept any shipment from your company?

A. To the best of my knowledge Union Freightways, Watson Bros., Merchants Motor Freight, Prucka Transportation Company, Wilson Storage & Transfer, Haeckle's Express, Bos Truck Lines, Iowa-Nebraska Darling Transfer, Sturm Freightways have all consistently, in every instance, refused to accept freight from us.

Q. Now, Mr. Clark, some considerable mention or inquiry was made yesterday of Mr. Romans concerning his interchange relations with Burlington Truck Lines. What has been the experience of your company in interchanging

freight or receiving freight from Burlington Truck Lines from January 1, 1956 to date?

Mr. James: I object to that unless it is more closely identified, Mr. Examiner, as to date and place and circumstances.

Exam. Sutherland: Did you mention the date, Mr. Harding?

Mr. Harding: January 1, 1956, to date.

Exam. Sutherland: To date?

Mr. Harding: Yes, sir.

Exam. Sutherland: The objection is overruled.

The Witness: Would you read the question?

(Question read.)

A. In that period of time this has been our experience. To the best of my knowledge, from examining our records, our interline records, we did do some interchange business [fol. 194] with Burlington Truck Lines from January 1, 1956, until May 5, 1956. There were no interchange shipments from May 5, 1956 to June 6, 1956, on which date one shipment from our territory to theirs somehow slipped through and from June 6, 1956 to August 17, 1956, there were no shipments.

Mr. Goodman: I ask that the answer be stricken as not being responsive to the question.

Exam. Sutherland: When you say "no shipments" do you mean you didn't have anything to offer them, Mr. Clark? Is that what you mean?

The Witness: No, not necessarily. It's probably that we did have shipments to offer them. In examining the records before that date and after that date we had quite a few shipments before that date and after that date.

Exam. Sutherland: I am going to have the question and answer stricken because I think the Commission will want to get a clear picture of this matter.

Mr. Harding: All right, Mr. Examiner.

By Mr. Harding:

Q. Mr. Clark, from August 17, 1956, to date, have you conducted any interchange operations with Burlington Truck Lines?

A. Yes, sir.

Q. From the examination of your interline register or file, can you state whether that has been one or more shipments per month since that time?

[fol. 195] Mr. Goodman: Objection on the grounds it doesn't prove any issues in this proceeding at all. Apparently there is an attempt to impute the Burlington refused their shipments by this type of question and answer being sought.

Exam. Sutherland: I'll sustain the objection. I think we ought to have a fair record here now as to whether or not Burlington has been accepting their freight or whether they haven't. I'll sustain the objection.

By Mr. Harding:

Q. Now, Mr. Clark, did you personally tender any freight to any of the other rail subsidiary motor carriers—Santa Fe or Rock Island Motor Transit?

A. Yes, sir.

Q. And when did you do that, sir?

A. On or about July 1.

Q. Of what year?

A. Of 1956.

Q. And which carrier?

A. Santa Fe Trail Transportation Company.

Q. And where was the shipment going, Mr. Clark? Where was it consigned to?

A. To Kansas City.

Exam. Sutherland: Kansas City, Missouri.

The Witness: Right.

By Mr. Harding:

Q. Was the shipment accepted?

A. No, sir.

[fol. 196] Q. Who did you talk to at Santa Fe?

A. Mr. Wilson, and the dockman whom I didn't get his name.

Q. Do you know Mr. Wilson's capacity with the company?

A. To the best of my knowledge he is terminal manager.

Q. At Omaha, Nebraska?

A. Right.

Q. Did Santa Fe accept the shipment?

A. No, sir.

Q. Did you have some conversation with Mr. Wilson at that time?

A. Yes, sir.

Q. Was anyone with you?

A. No, sir.

Q. What was said by you and Mr. Wilson at that time?

Mr. Reeves: Objection to the question as calling for hearsay.

Exam. Sutherland: Objection overruled.

A. Mr. Wilson told me that their could not accept our freight.

By Mr. Harding:

Q. Is that all he said to you?

A. In the main, yes.

[fol. 201] Q. Was there any other carrier to whom you tendered an interstate shipment on October 29, 1956, at Omaha, Nebraska?

A. Yes, sir.

Q. And what was that carrier's name?

A. Burlington Truck Lines.

Q. Did you personally tender the shipment to Burlington?

A. Yes, sir.

Q. Was anyone with you when you tendered the shipment to Burlington?

A. Our driver, Jerry Milne.

Q. Did you take the shipment down to the Burlington Truck Lines' terminal in Omaha?

A. Yes, sir.

[fol. 202] Q. And what was its destination, Mr. Clark?

A. To Chicago, Illinois.

Q. Did you contact someone at the Burlington terminal?

A. Yes, sir.

Q. Who did you contact?

A. I contacted a man who I believe was the dock foreman, a man by the name of Terano.

Q. Did you tender the shipment to him?

A. Yes, sir.

Q. Did you have some conversation with him at that time?

A. Yes, sir, upon being asked to receive our—

Mr. Harding: Just a minute, please.

Mr. Weinberg: Would you set a date, please?

Mr. Harding: October 29, Mr. Weinberg.

Mr. Weinberg: Thank you.

By Mr. Harding:

Q. What was the conversation to the best of your knowledge or recollection, Mr. Clark?

A. Mr. Terano said he would not receive our freight and I asked him why and he said he would not tell me or Mr. Milne anything and I asked him why it was after accepting freight for a number of months previous or a number of weeks previous, rather, he would not now accept it, and he just said he would tell us nothing. He insisted on refusing the freight and asked me if I thought he was a fool. "I won't tell you anything" were his exact words.

Q. And was Mr. Milne present during the course of that conversation?

[fol. 203] A. Yes, sir.

Q. Did Burlington Truck Lines accept the shipment that day?

A. No, sir.

[fol. 239]. Q. And on October 29, 1956, you appeared at four places, is that correct, Des Moines Transportation Company, Sturm Freightways, Haeckle's and Red Ball Transfer Company?

A. And Burlington.

Q. And Burlington, excuse me.

A. That's right.

[fol. 240] Q. Did you appear at any other places on October 29, 1956, any other carriers, I mean?

A. I believe not.

Q. Was your freight accepted at Burlington on that date?

A. No, sir.

Q. Did you submit the freight to any other carrier besides the five we have just mentioned on that date?

A. Not on that date.

Q. Could you have?

A. Personally?

Q. Yes.

A. It's possible.

Q. But it was your own choice you didn't want to submit it to any other carrier on that date?

A. Possibly because of lack of time.

Q. Could you remember what kind of freight that was you tendered to these places, the general nature of the merchandise, the freight?

A. If I could I would have an awful good memory. I'll say no.

Q. I'm not trying to make it important, I'm just trying to find out if you have any idea what kind of freight it was.

A. Various shipments. I don't remember the nature of the freight.

Q. You did the same thing the next day, is that correct?

A. Yes, sir.

Q. Did any carrier accept that freight in Omaha, Nebraska?

[fol. 241] A. No, sir.

Q. How many carriers did you tender it to?

A. I believe only one.

Q. What was the name of that carrier?

A. Santa Fe Trails.

Q. Santa Fe Trails?

A. Yes.

Q. Did you subsequently get the shipment accepted by any carrier?

A. Possibly at a later date, but not that date and personally.

Q. Was it your choice not to go to any other carrier on October 30, 1956?

A. Possibly for the same reason, lack of time.

[fol. 346] DELBERT V. CLARK was sworn and testified as follows:..

Direct examination.

By Mr. Harding:

Q. Will you state your name and address, please, sir?

A. Delbert V. Clark, 3036 Larrimore Street, Omaha, Nebraska.

Q. And what is your occupation or business, Mr. Clark?

A. I am terminal manager for Clark Bros. Transfer at Omaha, Nebraska.

[fol. 356] Mr. Harding: * * * That the witness would also testify that under date of October 18, 1956, he went down to the terminal of Burlington Truck Lines and contacted Mr. Fred Peterson, terminal manager of that company and that he also inquired of Mr. Peterson whether Clark [fol. 357] Brothers would be able to resume a normal interchange business relationship with Burlington Truck Lines on interstate traffic, and that Mr. Peterson advised him that a Mr. Thiessen of the Union had been on the Burlington Truck Lines dock and had talked for quite a period of time with one John Dryer, the Union Steward at the Burlington Truck Lines dock on October 17, 1956; that Mr. Peterson further advised Mr. Clark that he didn't know what his company was going to do concerning Clark Brothers' interchange business.

That on October 19, 1956, Clark Brothers had sent a shipment of interstate freight to Burlington Truck Lines to be interchanged with that company and that it had been refused by Burlington Truck Lines, and that on that same

date at 2:10 P. M. Fred Peterson of Burlington Truck Lines called this witness and asked him to send a truck over to Burlington's dock with the same freight which had been tendered earlier in the day and which had been refused; that the truck was dispatched with the freight, backed into the dock at Burlington at 3:10 p. m., and the freight was received and accepted by a Burlington Truck Lines employee.

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[fol. 366]

CROSS EXAMINATION

Q. Do you of your own knowledge or by observation know whether or not any of your freight was ever refused at the Santa Fe dock at Omaha, Nebraska, since July 30, 1956?

A. Yes, sir.

Q. It has been?

A. Yes, sir.

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[fol. 570] ROYAL F. LYON was sworn and testified as follows:

Direct examination.

By Mr. Harding:

Q. Will you state your name and address for the record, please, sir?

A. Royal F. Lyon, 3721—18th Street, Columbus, Nebraska.

Q. What is your occupation or business there?

A. In the freight business.

Q. Motor carrier?

A. Motor carrier.

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[fol. 575] Q. Can you give us the names of the motor carriers with whom you carry on these interchange operations?

A. At the present time?

Q. Well, let's say a date for certain, let's say in January [fol. 576] of 1955, first of all.

A. Merchants Motor Freight; Independent Truckers, Inc.; Watson Bros.; Pruëka; Union Freightways; Bos Truck Lines; Haackle Express, I take that back they were On Time at that time.

Q. All right.

A. Des Moines Transportation; Santa Fe Trail; Burlington Truck; Buckingham; Burlington-Chicago; Navajo; Ringsby. That's about all.

Q. Would that comprise the most of them at Omaha?

A. Yes.

Q. And during that same period of time or at that time, I should say, what carriers did you interchange traffic with at Lincoln, Nebraska, interstate traffic?

A. At that time Red Ball Transfer; Burlington. That's all I can think of.

Q. Are you a party to a tariff-publishing agency?

A. Yes, sir.

Q. And what is that?

A. Midwest Motor Freight Bureau.

Q. Does your tariff-publishing agency publish tariffs in your behalf and in behalf of others indicating that there are through routes and through rates arrangements published in behalf of your company in connection with the other carriers?

A. Yes, sir.

Q. And as a part of such publication, have you filed with [fol. 577] and received from other carriers tariff concurrences for interchange of interstate traffic?

A. Yes.

Q. At what points do you indicate you concur on those through rates?

A. Omaha and Lincoln.

Q. And in these tariff publications have you held your services out to generally concur in through rates and through routing?

A. Yes.

[fol. 585] By Mr. Harding:

Q. On April 18 did anything occur which interfered with the normal interchange relations which you had just previously been conducting with these interstate carriers?

A. I'm not sure on that date. We were not shut off that day, but I think two days later,—

Mr. Stockton: I submit the question has been answered, Mr. Examiner.

Mr. Higgins: It's certainly susceptible of a yes or no answer, at any rate.

Exam. Sutherland: Miss Reporter, will you read the last question, please?

(Question read.)

Exam. Sutherland: Apparently you have indicated nothing happened on that particular day, is that right?

The Witness: No, not on that day.

By Mr. Harding:

Q. Did anything happen within two or three days subsequent to that day?

A. Yes.

Q. What happened?

A. We were shut off from our freight.

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[fol. 853] CHARLES WARRICK was sworn and testified as follows:

Direct examination.

By Mr. Powell:

Q. Will you state your name and your address, please?

A. Charles Warrick, Norfolk, Nebraska.

Q. How is your last name spelled, please?

A. W-a-r-r-i-c-k.

Q. What is your business, Mr. Warrick?

A. I own an interest in and manage a tire and tread shop in Norfolk.

[fol. 854] Q. When you state you manage a tire and tread shop, will you describe what your duties are?

A. Supervision of office procedure, personnel, plant procedure and sales.

Q. What is the name of your company?

A. Warrick-Hawkinson Tread Service.

Q. How long have you been engaged in that business in Norfolk?

A. Nine years.

Q. Are you familiar with the transportation problems encountered by your company?

A. Yes.

Q. And do you have any control of the traffic problems of your company?

A. The only control I have is my routing specifications which I place on all orders for merchandise.

Q. You do that personally?

A. Yes.

Q. You handle all traffic matters then for your company?

A. Yes.

Q. Where is this tire and tread business located?

A. At Norfolk, Nebraska.

Q. Do you have any other points at which you have a similar business or store?

A. We have a branch at Fremont, Nebraska.

Q. Will you just describe what the business of your company is a little bit more in detail, Mr. Warrick?

A. We sell new tires and tubes on a wholesale and retail basis, and we tread tires and repair them.

Q. In the retreading of tires, what is the principal commodity you ship into Norfolk?

A. A material known in the industry as camelback.

[fol. 861] Mr. Powell: In view of the Examiner's ruling, at this time I wish to make an offer of proof, that if allowed to testify this witness would testify from certain [fol. 862] shipping documents and certain letters which he had in his possession and if allowed to testify his testimony

would have revealed the fact that the particular shipment to which he referred originated at Cuyahoga Falls, Ohio, and the bill of lading further shows that the routing specified was Morrison to Chicago, Burlington Truck at Chicago care of Clark Bros. at Omaha; the testimony of this witness on this particular shipment would further show that the shipment was actually tendered to him for delivery by Joe Roy Freight Lines rather than Clark Bros. as specified and further that the shipment was received on December 15, 1956. He would have so testified.

Mr. Goodman: When, December 15?

Mr. Powell: Yes, sir, he would have further testified that on this particular shipment there were 12 cartons of camelback short on the shipment and that as a result of that fact his company was inconvenienced and had to correspond with the shipper with reference to the shortage and that the 12 short cartons were not delivered until four days later. I make that offer, if the Examiner please.

Exam. Sutherland: All right.

[fol. 1076] JACK FRANKLIN FORD was sworn and testified as follows:

Direct examination.

By Mr. Harding:

Q. Will you state your name and address, please, sir?

A. Jack Franklin Ford, Omaha, Nebraska.

Q. And by whom are you employed?

A. The Ford Storage & Moving Company, Omaha, Nebraska.

Q. In what capacity?

A. I am the secretary of the company and general manager of operations.

Q. As general manager of the company, are you generally familiar with the business operations of the Ford Storage & Moving Company?

A. Yes, sir.

[fol. 1101]

Cross examination.

By Mr. Stockton:

[fol. 1102] Q. Now, at the specific request of your counsel you indicated that subsequent to May of 1956 you called upon four named carriers, Red Ball, Prucka, Watson Bros., and Interstate Truckers, Inc., seeking service from one or more of the points mentioned in the application. You indicated that you were unable to obtain the service you wanted. Now, let me ask you this, sir, do you know [fol. 1103] whether or not there are numerous other carriers operating between Omaha on the one hand and on the other Chicago, Kansas City, Denver, St. Louis and the Twin Cities?

A. Yes, sir.

Q. I take it from your testimony, sir, that in spite of the fact you knew there were other carriers you didn't contact any of them?

A. No, sir, that's incorrect.

Q. Tell me what is correct then, what other carriers did you contact other than those four in an attempt to obtain this service?

A. You're asking for a long list of carriers, Mr. Stockton.

Q. Well, we've spent about 10 days on this hearing and I'm willing to sit here and listen to them because I want to know who you contacted other than the four you named?

A. Without too much reasonable doubt in my mind I'd say most every carrier that comes into Omaha.

Q. That answer is not sufficient for me, sir, because I don't know all the carriers that come into Omaha. I want the names of the ones you talked to, to the best of your recollection.

A. Do you want the specific movement or just want me to name them?

Q. Mr. Ford, I want you to name the carrier you are sure you contacted subsequent to May of 1956, in an attempt to obtain service to or from Chicago, Kansas City, Denver, [fol. 1104] St. Louis, the Twin Cities, other than Red Ball, Prucka, Watson Bros., and Independent Truckers, Inc., whom you have already named.

A. I could also add to that list Des Moines Transportation Company, Burlington Truck Lines, Union Freightways, Bos Freight Lines, Darling Transfer Company, Ringsby. That's all I can think of right at the moment. Those are a few.

[fol. 1148] Redirect examination.

By Mr. James:

Q. Did you actually talk to someone at Burlington Truck Lines?

A. Oh, yes.

Q. When was that, about?

A. Approximately June 1956.

Q. What traffic or proposed traffic did it deal with? I mean interstate traffic that is related to this proceeding?

A. Kansas City to Omaha.

Q. With whom did you talk?

A. Mr. Fred Peterson.

Q. On the telephone, or just what?

A. Telephone.

Q. You indicated you would like to have service to or from Kansas City?

A. Yes, sir.

Q. As a matter of fact, you have rarely patronized Burlington Truck Lines, isn't that true?

A. No, sir.

[fol. 1119] Q. Well, the volume that Burlington has enjoyed with your company has always been quite low, has it not?

A. That's entirely in anyone's opinion what is small or large.

Q. In any event, what took place at the time you talked with Mr. Peterson about some shipment to or from Kansas City? I'm asking you what was said or what was done?

A. In conferences with Mr. Peterson, we were asking him if he would please bring us a truckload of Maxwell House Instant Coffee from Kansas City, Missouri, to Omaha. He felt that he would attempt to give the service in his first conversations. He retracted that offer, however,

in a later telephone call and said he couldn't offer the service.

Q. That was the extent of the conversation with Mr. Peterson, is that correct?

A. I'd say generally.

Mr. James: That's all.

[fol. 1186] RUSSELL ARNOLD was sworn and testified as follows:

Direct examination.

By Mr. Powell:

Q. Will you state your name and your business address, please?

A. Russell Arnold, Norfolk, Nebraska.

Q. What is your business, Mr. Arnold?

A. Soft-water service.

Q. Under what name do you do business?

A. Culligan Soft Water Service.

Q. What is your connection with that business in Norfolk, Nebraska?

A. I'm the owner and operator.

Q. How long have you been in business?

A. Ten years.

Q. Are you the active manager?

A. Yes.

[fol. 1189] Q. Generally, what carrier have you designated on the movement from Chicago to Omaha?

A. Most recent?

Q. The most recent and then we'll go back.

A. Burlington is the most recent.

Q. The most recent?

[fol. 1190] A. Yes.

Q. Burlington Truck Lines?

A. Yes.

Q. For how long have you been designating Burlington on the movement from Chicago to Omaha?

A. Definitely during the months of December and January of this year, December of 1956 and January of 1957.

Q. In the summer of 1956, what carrier or carriers did you designate on movements from Chicago to Omaha?

A. ITI, I don't remember the exact name, but it's Independent—

Q. Independent Truckers, Inc.?

A. Yes, that's it.

Q. Any other carriers?

A. Prior to that time, I can't remember the exact date, but Union Freightways, we have indicated Union Freightways prior to that time.

Q. In the summer of 1956 what carrier did you designate for the continuation of the shipment from Omaha, Nebraska, to your point of destination at Norfolk?

A. Clark Bros. or Abler Transfer.

Q. Have your routing instructions in all instances been observed?

A. They were not observed during 1956.

Q. And have they been observed recently?

A. Yes.

[fol. 1191] Exam. Sutherland: Mr. Arnold, when you said they had not been observed during 1956, do you mean in every case or in certain instances?

The Witness: As far as I can remember every case they have not been observed in.

By Mr. Powell:

Q. In 1956?

A. In 1956.

Exam. Sutherland: Thank you.

By Mr. Powell:

Q. But they are being observed at the present time when you designate Burlington Truck Lines and either Clark or Abler?

A. No.

Q. They have not?

A. No, they have not been, when you say "either".

Q. Are they being observed today or are they not being observed today?

A. Your question was as to either Clark or Abler. We'll have to confine it to one of the two, which is Abler.

Q. When you designate routings via Burlington Truck Lines and Abler, Mr. Arnold, have those instructions been observed since January of 1957?

A. Yes, they have been.

Q. Have you designated at any time Clark and Burlington since January of 1957?

A. Either late in December or in January, I have.

[fol. 1192] Q. And was that routing instruction followed?

A. No.

Q. And in those instances, who was the delivering carrier?

A. Principally Joe Roy.

Q. Have there been any other carriers other than Joe Roy you can recall?

A. As I stated, Middlewest—I guess I didn't state.

Q. No.

A. Middlewest Motors.

Q. They have handled some of your shipments?

A. Two that I know of.

Q. Only two?

A. Yes.

Q. And do you know when they handled those?

A. I think one was in April.

Q. Of 1956?

A. 1956, and I cannot give you the definite date. I cannot remember the definite date. It might have been April.

Q. Do you prefer that your routing instructions be observed in all instances?

A. Yes, I do.

Q. Why do you wish to have your routing instructions followed?

A. Because the carriers from Omaha to Norfolk are local carriers which makes it more convenient for me to deal with.

Q. In what way is it important that you have carriers [fol. 1193] headquartered in or near Norfolk, your delivering carriers?

A. Well, the merchandise comes directly from Omaha and is not stopped or held over in any other point between.

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[fol. 1228] EUGENE MARTIN was sworn and testified as follows:

Direct examination.

By Mr. Powell:

Q. Will you state your name and address, please?

A. Eugene Martin. My address is Neligh, Nebraska.

Mr. Powell: Mr. Martin, I am going to ask you to speak up clear so that we can all hear. We are all entitled to hear what you have to say. We have had some difficulty with witnesses heretofore so just please speak up.

By Mr. Powell:

Q. By whom are you employed, Mr. Martin?

A. I work for the Contois Motor Company.

Q. And what is the business of the Contois Motor Company?

A. We are Ford and Mercury dealers.

Q. At what points do you have distributorships?

A. We have businesses in Neligh, Elgin and Clearwater.

Exam-Sutherland: Those are all in Nebraska?

The Witness: That's right.

By Mr. Powell:

Q. In the conduct of your business, do you deal also in automobile parts?

A. Yes, sir.

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[fol. 1236] Cross examination.

[fol. 1239] By Mr. James:

Q. Mr. Martin, has the service in which Burlington Truck Line participated been satisfactory?

A. In some instances yes and in some no. There has been delays with both services.

[fol. 1240] By Mr. Goodman:

Q. In the month of January 1957, what has been your routing?

A. Why I have consistently designated Burlington Truck from Des Moines to Omaha and Abler Transfer to Neligh.

Q. And during the month of January 1957 has that routing been followed?

A. No.

Q. It hasn't?

A. No.

Q. Who has been bringing it in in the month of January 1957?

A. I'd say that I have had three carriers delivering from Omaha to Neligh.

[fol. 1358] PHIL KATZMAN was sworn and testified as follows:

[fol. 1359] By Mr. Levin:

Q. Will you state your full name to the examiner, if you will, please?

A. Phil Katzman.

Q. And will you state your home address?

A. 2514 Sahler Street

Q. That is Omaha?

A. That's Omaha, yes.

Q. And what is your business?

A. Omaha Parlor Frame Company.

Q. What is your connection with that firm?

A. I am one of the officers and general manager.

Q. How long have you been a resident of Omaha?

A. All my life.

Q. And how long has this firm been in existence?

A. Oh, 29 years.

Q. And has it been in existence in Omaha during that entire period?

A. Yes.

Q. Will you tell us the nature of that business that this firm conducts?

A. They manufacture wood products such as frames for upholstered furniture, television bases, and other finished cabinets.

Q. Is the firm's business confined to wood products?

A. Yes, confined to wood products.

[fol. 1380] By Mr. Levin:

Q. Prior to October 18, 1956, did the Prucka, Union Freightways, and Watson Bros. firms deliver inbound freight and receive your outgoing shipments?

A. They did not, neither did—

Mr. Powell: Prior to October 18.

By Mr. Levin:

Q. Before October 18?

A. Oh, yes, prior. They certainly did. In fact, all the mentioned carriers previously did.

Q. And when you say all of the mentioned carriers, whom do you include?

A. Merchants, ITI, Ringsby, Santa Fe, and after that date none of them came in.

[fol. 1382] Q. Did you have outgoing freight from October 18, 1956, to January 28, 1957, for the same firms during this period?

A. Yes, sir.

Q. Did any of them come to your door to take it?

A. No, sir.

Q. I might ask you—

Mr. Levin: (Addressing the reporter) Will you mark this, please?

Mr. Stockton: Before we go further may I direct a question to counsel regarding his last question?

Exam. Sutherland: Yes.

Mr. Stockton: You said the same carriers. Whom did you mean by that? Did you mean the four that you just named?

Mr. Levin: The various names mentioned.

Mr. Stockton: I wanted to know what was meant by "the same firms." What carriers are meant?

By Mr. Levin:

Q. All right. Will you answer counsel's question concerning [fol. 1383] the trucking companies that would be included in that statement?

A. Well, those are the ones that we originally listed.

Mr. Powell: Just name them, please, Mr. Katzman.

The Witness: There's Merchants, Prucka, Union, Watson, Ringsby, Santa Fe, and PIE and Navajo.

Mr. Levin: Very well.

The Witness: We used all those various carriers.

[fol. 1398] Q. Will you indicate to us the resulting effect on your firm by reason of your having to use the independent carriers to receive your outgoing shipments and transmit them to others so that they would reach their destination?

[fol. 1399] Mr. Goodman: Objection—

Exam. Sutherland: When you say independent there, you mean local carriers?

Mr. Levin: In particular we refer to local carriers and in that connection we refer to Winter Bros. and Ford Transfer, who the witness testified were receiving their

shipments and then forwarding them along some way so that they would reach their destination.

I want to know what the effect was on his firm, both as to the time which elapsed and the expense, and I am referring of course to the same period of October 18, 1956, to the 28th of January, 1957.

Exam. Sutherland: The objection is overruled. He may answer.

(Question read.)

A. It was a costly procedure.

By Mr. Levin:

Q. What was the additional cost, if you can give it to us, on a weekly basis?

A. Operating under these handicaps during that period would run between \$500 and \$700 a week as far as I can answer it.

[fol. 1979] E. R. APKING was sworn and testified as follows:

Direct examination.

By Mr. Powell:

Q. Will you state your name and where you reside, [fol. 1980] please?

A. E. R. Apking, Ord, Nebraska.

Q. Are you connected with any business at Ord?

A. Yes, sir, I'm with Quiz Industries.

Q. And what is your capacity with Quiz Industries?

A. I am assistant general manager.

Q. What are your duties as assistant general manager?

A. To generally supervise operations of our firm; to sell, to price the product we produce and to handle correspondence pertaining to our business.

Q. And do you have anything to do with the policy making of the concern?

A. I do.

Q. Are you very closely connected with the manager?

A. Yes, sir.

Q. And who is the manager?

A. E. C. Leggett.

Q. Will you tell us, Mr. Apking, what is the business of Quiz Industries?

A. We are a printing and publishing and photoengraving plant.

Q. How many employees do you have?

A. Fifty-five.

Q. Will you tell us what kind and type of printing you do?

A. We print and publish newspapers; we print and publish magazines; we print magazines for other customers; [fol. 1981] we do commercial photoengraving; we print advertising letters, envelopes, items of that nature. We do a mailing service.

Q. Do you print any catalogs?

A. Quite a number, sir.

[fol. 2000] Cross examination.

By Mr. Stockton:

[fol. 2001] Q. You also indicated to Mr. Powell on direct examination you had specified on some shipments from Kansas City to Omaha and thence on to Ord routings via Burlington Truck Line from Kansas City to Omaha and then Romans beyond?

A. That's correct.

Q. You also indicated that those routings had been honored and the service had been satisfactory?

A. I did not.

Q. You didn't?

A. I did not indicate that those routings had all been honored. I said prior to a certain date they had been satisfactory.

Q. Let's go back and start over again.

A. All right.

Q. Prior to the spring of 1956, had you previously routed Burlington to Omaha and Romans beyond?

A. Yes.

Q. Had those routings been honored?

A. Yes.

Q. Had that service been satisfactory?

A. Yes.

Q. Subsequent to the spring of 1956, had you specified Burlington to Omaha and Romans beyond?

A. Yes.

Q. Were those routings honored?

[fol. 2002] A. Not in all instances.

Q. I understand that. When you say "not in all instances" did you mean by that the vast majority of them were not honored or one or two were not honored or what did you mean?

A. Specifically I can tell you of one within the last four or five days that was not honored.

Q. One shipment in the past four or five days Burlington to Omaha from Kansas City? That routing was honored?

A. Correct.

Q. Romans beyond, which was not honored?

A. Correct.

Q. Can you give us the specific date on that, sir, or approximately the specific date?

A. This was a shipment of ink, printing ink, ordered from Interchemical Corporation of Kansas City, ordered January 23, of which we received an acknowledgment on January 29 stating that shipment would be made and the material arrived in Ord, Nebraska, on—

Q. Wait a minute. You are getting ahead of yourself. Burlington Truck Lines was designated as the origin carrier?

A. Yes, in our order of January 23.

Q. Designating Romans beyond Omaha?

A. Correct.

Q. Now, then, has the shipment yet arrived?

A. The shipment arrived on February 12.

[fol. 2003] Q. Now, then, did you bring any freight bills or anything to indicate that had not been honored?

A. No.

Q. How did it arrive? I mean by that how did it arrive, by truck line or how?

A. It arrived by rail freight.

Q. Did you examine the documents to determine whether or not it had moved Burlington to start with?

A. Yes.

Q. But you did not bring the documents along with you to this hearing?

A. No.

Exam. Sutherland: Were you using the term Burlington—

Mr. Stockton: I'm talking about the Burlington Truck Lines all the time.

[fol. 2095] LESLIE K. CHAFFIN was sworn and testified as follows:

Direct examination.

By Mr. Harding:

Q. Will you give us your name and address, please, sir?

A. Leslie K. Chaffin, Norfolk, Nebraska.

Q. And what is your business, sir?

A. We process and distribute milk and dairy products.

Exam. Sutherland: Mr. Chaffin, will you speak up so everybody can hear?

The Witness: Yes, sir. We process and distribute milk and dairy products.

By Mr. Harding:

Q. I see you use the term "we", is your business a partnership?

A. Corporation.

Q. Are you an officer of the corporation?

A. Yes, I am an officer.

Q. What is the name of the corporation?

A. Gillette Dairy, Inc.

Q. How long has the Gillette Dairy, Inc., been in business there in Norfolk, Nebraska?

A. About 40 years.

[fol. 2100] Q. And if you can, sir, tell me what originating carrier your carriers you were using from Chicago, Illinois?

[fol. 2101] A. I believe that we were using practically all of them. We would mark one shipment— What we do is we always talk to the people we are buying from because our inventory consists of about \$35,000.00 to \$40,000.00, and we like to keep that to a minimum, so we always talk to the people supplying us and get the people that they are often dealing with. Sometimes it would be Burlington and the next time it would be Watson Bros.

Q. In other words, you ask them for their suggestion in that connection?

A. That's right.

Q. And prior to the fall of 1955 or early 1956, was the motor-carrier service you were using from these various named points satisfactory?

A. Prior to that time, yes, very satisfactory.

Q. And as I understand it, you were using Clark and Abler as delivering carriers?

A. That's right, sir.

Q. Now, subsequent to the fall of 1955 and early 1956, did anything occur to this previous combination service which you had been using that had an effect on that service and your business?

A. Do you mean after 19—

Q. Yes.

A. Definitely.

Q. And what occurred, sir?

A. Well, our shipments were being delayed. We have [fol. 2102] records in Norfolk—I didn't bring any with me but I could have brought my whole file—showing our shipments coming out of Chicago, or any other of these points just wouldn't be delivered. We had a chocolate shipment coming in that was, I think, about three weeks late, at one time. I believe this happened last spring, we had an ice-

cream cabinet being delivered to Elgin, Nebraska, and it didn't come and didn't come. Finally it came and then it wasn't given to one of the regular haulers. The guy that had it was using a stock truck. They came in to our account at Elgin and said "Here your cabinet is, where do you want it?" In taking the cabinet off the truck, they dropped it and broke the control line that runs from the temperature control to the unit and consequently Kelvinator had another bill to pay besides the freight.

Q. Since early in 1956, have you continued to specify to your shippers that either Clark or Abler shall be the delivering carrier?

A. We certainly have.

Q. And have your routing instructions been honored, sir?

A. No, sir. They don't even bother any more to make out a new ticket, they just scratch it off, Abler or Clark, and send it by somebody else.

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[fol. 2103] By Mr. Harding:

Q. Have you, sir, during the year 1956 made any complaint to any of these originating carriers which you have used from Chicago?

A. Do you mean like Watson Bros.?

Q. Yes.

A. Oh, sure, I called them up.

Q. Have you complained about the fact that your routing instructions have not been followed?

A. I certainly have.

Q. Have you gotten any satisfaction out of them after such complaints were made?

A. None whatever.

Q. Have they given you any reason why your routing instructions were not followed?

A. They just beat around the bush.

.

[fol. 2104] Cross examination.

By Mr. Stockton:

Q. Mr. Chaffin, what origin carriers did you call—

A. Beg your pardon, sir?

Q. —complaining about this situation?

A. Well, it all depends on who it is. I mean we've made several calls. I've written to Washington, I've written to the Milk Foundation.

Q. Let's go back to my question.

Exam. Sutherland: Try to answer the question.

A. All of them, I think, at times we've called them all.

By Mr. Stockton:

Q. That isn't going to satisfy me, Mr. Chaffin. I would like to have you name the individual carriers you have called that you recall and the approximate date of the call, if you can give me that, sir?

A. I can't give you the approximate date of the calls [fol. 2105] without going back and checking the records, but if we've called them once we've probably called them a dozen times.

Q. Now, you have called Watson Bros. Any others?

A. Burlington. You name the people in Omaha and I'll tell you whether we've called them or not.

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[fol. 2828] JACK FORD was sworn and testified as follows:

Direct examination.

By Mr. Harding:

Q. Your name is Jack Ford?

A. Yes, sir.

Q. And you have already testified in these proceedings?

A. Yes, sir.

Q. You are the same Jack Ford who is an officer in and associated with the Ford Brothers Van and Storage Company, Omaha, Nebr.?

A. Yes, sir.

[fol. 2831] Q. Did you ask Mr. Hornung for service on this shipment from Omaha to Chicago?

A. I did.

Q. Did you get any reply from Mr. Hornung that their company would handle the shipment?

A. He absolutely denied any service to us.

Q. Did he indicate to you whether Ringsby would dispatch a pickup truck to your place of business?

A. He did. He said he would not dispatch it.

Q. He said he would not dispatch it?

A. Yes.

Q. In view of that development, did you contact any other transportation agency in Omaha that day?

A. Yes, sir.

Q. And what company?

A. Burlington Truck Lines.

Q. Who did you talk to at Burlington?

A. Mr. Fred Peterson.

Q. And did you request service of Mr. Peterson on this shipment?

A. Yes, sir.

Q. At the—state at about what time of day it was that you called Burlington Truck Lines?

A. At approximately 2:15 p. m., February 20, 1957.

Q. What did Mr. Peterson advise you when you contacted him?

[fol. 2832] A. He indicated he would advise their dispatcher to dispatch a truck to give us the service we requested, and he informed me that if service couldn't be rendered he would give me a return call.

Q. Did you get any such return call from Mr. Peterson that day?

A. I did.

Q. And approximately how much later from the time you first talked to him?

A. At approximately 3:45 p. m. Mr. Peterson telephoned me and advised me that no service could be given. The dispatcher had dispatched a truck, but he advised Mr. Peterson that the driver reported that he wouldn't cross any picket line, so no service could be received.

Q. I take it from your answer that you got no pickup service from Burlington that date?

A. That is correct.

Q. Let me ask you this, Mr. Ford, subsequent to the date you first testified in this proceedings has Union Transfer, Watson Brothers, or Pacific Inter Mountain Express, Prucka Transfer Company, Des Moines Transfer Company, or Bos Truck Line, or any of them, delivered any interstate merchandise to your dock at 1024 Dodge Street, Omaha, Nebr.?

A. No, sir.

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[fol. 2833] Cross examination.

By Mr. Axelrod:

Q. Mr. Ford, how did the shipment move eventually?

A. It hasn't gone.

Q. Why hasn't it gone, sir?

A. There was no service available from the carriers requested. We wanted to make this shipment, but was unable to do so.

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[fol. 2887]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

Civil No. P-2306

(Before Three-Judge Court)

BURLINGTON TRUCK LINES, INC., a Corporation, Plaintiff,

—VS.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES
OF AMERICA, Defendants.

OPINION OF THE COURT—Filed and entered April 27, 1961

Before Major, Circuit Judge, Mercer and Poos, District Judges.

POOS, District Judge. Burlington Truck Lines, Inc., a Corporation, plaintiff, filed its complaint seeking injunctive relief against Interstate Commerce Commission and the United States to restrain the enforcement of the orders of Interstate Commerce Commission granting a limited certificate of convenience and necessity to Nebraska Short Line Carriers, Inc., in the Commission proceedings entitled, "Nebraska Short Line Carriers, Inc., Common Carrier Application, Docket No. MC-116067."

Jurisdiction is authorized by Title 27, U.S. Code, Sections 1336, 1398, 228+, and 2321 through 2325, inclusive, all of which authorize interested parties to seek relief from a three-judge United States District Court.

The intervening plaintiffs are Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Trucks, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines,

Inc., Ringsby Truck Lines, Inc., and General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The effect of the pleadings of interveners is to adopt the allegations and theory of the plaintiff's complaint.

Plaintiff, and all interveners, except the labor union, are common carriers by motor vehicle in interstate commerce and subject to the Interstate Commerce Act." Plaintiff is authorized to engage in transportation of general commodities to, from and between points in Colorado, [fol. 2888] Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska and Wyoming, pursuant to a "Certificate of Public Convenience and Necessity," issued to it by the Interstate Commerce Commission. Its residence and principal offices are located in Galesburg, Knox County, Illinois. Watson Bros. Transportation Company, Inc., The Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., are likewise common carriers and are authorized to do business by virtue of "Certificates of Convenience and Necessity," issued by Interstate Commerce Commission to them in various proceedings and orders of the Commission. Their operations cover the States of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming, and the various business offices of these motor carriers are located at Denver, Colorado, Grand Rapids, Michigan, Omaha, Nebraska, and Salt Lake City, Utah. The application of Nebraska Short Line Carriers was opposed before the Commission by eighteen motor and rail carriers, and the intervening plaintiffs were included. All class rail carriers in western trunkline territory likewise opposed the application, as did the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America and Local No. 554 thereof.

The complaint alleges that Nebraska Short Line Carriers, Inc., by application filed June 22, 1956, Docket No. MC-116067, sought authority from the Commission to conduct operations as a common carrier in interstate and foreign commerce in the transportation of general commodities, with certain exceptions over irregular routes, between Denver, Colorado and Chicago, Illinois; between Omaha, Nebraska and Chicago, Illinois; between Minneapolis, Minnesota and Des Moines, Iowa; between Council Bluffs, Iowa and St. Louis, Missouri; and between Lincoln, Nebraska and St. Joseph, Missouri, serving intermediate and off route points on said routes; and that by application filed January 10, 1957, Docket No. MC-116067, (Sub-No. 2), sought authority to operate as a common interstate and foreign motor carrier in the transportation of general commodities, with certain exceptions over irregular routes between Omaha, Nebraska, on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, [fol. 2889] Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming; that in Case No. MC-116067, the hearing examiner by proposed order served September 3, 1957, recommended to the Commission that the application be denied because Nebraska Short Line Carriers had failed to prove public convenience and necessity, and for the same reason by proposed order served August 8, 1957, in Case No. MC-116067, (Sub-No. 2) recommended that the application be denied; the Commission by order dated June 1, 1959 consolidated both cases and granted authority to applicant to operate as a common carrier by motor vehicle in the transportation of general commodities with certain exceptions over regular route between Omaha, Nebraska and Chicago, Illinois, and between Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate points of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska, but denied

the other application for additional rights; that by order dated Mar. 10, 1960, the Commission denied the petitions for reconsideration and/or further hearing as filed by certain protesting carriers including the petition for reconsideration of plaintiff filed on July 27, 1959; and the complaint further alleges that the decision of the Commission is contrary to law for the same fourteen reasons, which, on analysis, challenge the jurisdiction of the Interstate Commerce Commission to enter the order in question under the law and the evidence.

The relief prayed is for entry of a decree adjudging the orders of Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, to have been entered in violation of the Interstate Commerce Act, and therefore unlawful, null and void, and for such other relief as the court deems meet. The intervening motor carriers adopted the allegations of the complaint. Intervening plaintiff, the General Drivers and Helpers Union, Local 554, allege substantially the same matters as plaintiff, and alleged in addition that the basis for the application of Nebraska Short Line Carriers, Inc., was a desire to protect itself from the so-called "hot-cargo clause" provision of the labor contract entered into by the Union, plaintiff and intervening plaintiffs' carriers.

The defendants and intervening defendant, Nebraska Short Line Carriers, Inc., filed answers to the complaint, [fol. 2890] intervening carriers' complaints, and to the intervening complaint of Local 554, in and by which all factual allegations were denied and refer to and adopt the record of Interstate Commerce Commission for the complete and accurate facts and findings made by the Commission. They admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing car-

riers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the National transportation policy; and admit that the Interstate Commerce Act does not contemplate or provide for issue of certificates of public convenience and necessity as a penalty, but say that the Act does provide for the issuances of certificates when the Commission finds that the service is, or will be required by the present or future convenience and necessity as provided in the Act; and further allege that the evidence adduced before the Commission, and here under review, established that the present and future convenience and necessity required operation by the applicant of a common motor carrier service between the points and to the extent set forth by the order of the Commission entered in this proceedings; refer the court to the Commission's report and order of June 1, 1959, for the complete and accurate reasons and basis for the grant of the certificate in question; and lastly, they say that the challenged orders of the Commission are lawful and in all respects valid and seek a decree that the relief prayed be denied, and the complaint and intervening complaints be dismissed.

All parties hereto agree to the findings of fact, one side of the litigants affirming these facts as justifying the orders, while the other deny that they do.

We are thus required to examine the facts and inquire, under those facts, whether or not there are substantial facts to either affirm or reject the respective orders under the applicable rules of law pertaining thereto.

[fol. 2891] The allegations of the complaint on which the plaintiff bases its right to relief, all adopted by the intervening plaintiffs, while stated in some fourteen allegations, when analyzed can be stated as based on one general proposition, namely, the questioned authority of the Commission to issue the Certificate granted under the Commission's statutory power. All other asserted propositions are urged as a basis for the denial of this power.

We are presented at the outset with the scope of judicial review of orders of the Interstate Commerce Commission. The Supreme Court, in a long line of decisions, has consistently held that orders of the Commission should not be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings and are supported by substantial evidence, even though the court might reach a different conclusion on the facts presented.

This principle is clearly enunciated in *Interstate Commerce Commission v. Union Pacific R.R. Co.*, 222 U.S. 541, 547-548; 56 L. Ed. 308, 311; 32 S.Ct. 108, wherein the Court said:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power (citing cases).

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments

of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I.C.C.*, 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

[fol. 2892] The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-87; *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 146. The Commission's judgment is to be exercised in the light of each individual case. The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or inconsistency of decisions which it has rendered. *Virginian Ry. Co. v. United States*, 272 U.S. 658, 663-66; *Western Paper Makers' Chemical Co. v. United States*, 271 U.S. 268, 271. In *Virginian Ry. v. United States*, 272 U.S. 658, the court said, (pp. 665-666):

... This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

Unless there is clear evidence to the contrary, it must be presumed that the Commission has properly performed its official duties; and this presumption supports its official acts. *United States v. Chemical Foundation*, 272 U.S. 1; *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602.

The National Transportation Policy of Sept. 18, 1940, (49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 207 (a) of the Interstate Commerce Act (49 U.S.C. 307 (a)) provides in part as follows:

Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied"

[fol. 2893] The admitted facts establish that Nebraska Short Line Carriers, Inc., is a corporation organized under

Nebraska law on June 14, 1956, with authority to issue 1,000 shares of common and 500 shares of preferred stock at \$100 per share; that at hearing time \$37,500 of common stock had been issued and held in varying amounts by Romans Motor Freight and other Nebraska intrastate carriers, the officers and owners of which were experienced men and companies in the transportation business of motor common carriers, and all of whom had certificates of convenience and necessity, either from the Nebraska State Railway Commission for intrastate Commerce or from Interstate Commerce Commission for interstate traffic movements. All carriers and individual owners holding stock in Nebraska Short Line Carriers, Inc., are non-union motor carriers and operate wholly within certain points in Nebraska. The Nebraska Intrastate carriers are Romans Motor Freight, Clark Bros. Transfer, Lyon Transfer, McKay Freight Line, Winter Bros., Abler Transfer, Inc., Fremont Express Co., Superior Transfer, Pawnee Transfer, Derickson Transfer, Steffy's Transfer, Crete and Wilber Freight Lines, and Tillman Transfer Company. The President of applicant is John Romans, the Vice-President is C. C. McKay, the Secretary, Walter F. Clark, and the Treasurer, Royal F. Lyon, and who, with Leonard Abler, constitute the Board of Directors. Most of the stockholding truckers are authorized to transport general commodities with exceptions between certain points in eastern and central Nebraska, including Omaha and Lincoln, and between Grand Island and North Platte. Collectively they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration. The traffic manager was able to secure terminal facilities at Chicago, St. Louis, Kansas City, Minneapolis and Denver, and found that drivers and plenty of motor vehicles could be procured for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease equipment from its stockholders or other motor carriers. The applicant, if granted authority, proposes to serve the public generally and its general manager indicated that no discrimination would be shown in selecting carriers for traffic interchange.

On January 26, 1957, applicant had total assets of \$32,785; liabilities of \$467; and net worth of \$32,318. By

order entered Dec. 4, 1956, temporary authority to applicant was approved upon meeting certain requirements.

[fol. 2894] In May, 1956, the stockholders, under their carrier rights, began to experience difficulties at Omaha, Lincoln and Grand Island, Nebraska, in respect to interstate traffic normally interchanged at those points with certain motor carriers. Romans was informed in Omaha, by an official of Independent, that the latter carrier was risking labor trouble with its employees, who are members of Teamster's Union, if normal interchange between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956, were not accepted by that carrier. These shipments were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it did not do so in every instance. Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grand Island, particularly with Red Ball and Watson. Time is consumed in finding motor carriers willing to accept traffic, and Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application, and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made particularly to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Burlington has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight decreased in 1956 compared to 1955 volume. His gross revenue in 1956 was \$138,775, as against \$159,280 in 1955. Prior to May, 1956, 30 per cent of his traffic consisted of outbound shipments, and 70 per cent was inbound. Presently most of his traffic consists of shipments moving out of the terri-

tory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prueka, taken over by Interstate Motor Freight System, Inc., Red Ball, Ringsby, Santa Fe Trail, Watson, Burlington [fol. 2895] ton-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl Express, Inc., Ideal Truck Line, Iowa-Nebraska Transportation Company, Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company, Wright Motor Freight Lines, now B-C Cartage, D.M.T., Haeckl, Ideal I.N.T., McMaken, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson and Wright, respectively. These were most of the major motor carriers with whom interchange was affected. After the approximate date of May 7, 1956, these truck lines would not tender or accept freight from Romans at certain times, and this has continued. Interchange between Romans and Burlington, Santa Fe Trail and Rock Island has continued. Ringsby has also accepted freight.

Romans is non-union. There have been no strikes by his employees, nor have any pickets been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk, Nebraska. It serves Sioux City, Iowa, as well as Omaha. No terminal facilities have been operated by this carrier at Sioux City since March 15, 1956, when certain unionized connecting carriers serving that point discontinued normal interchange operations with him. Shortly thereafter the discontinuance of normal interchange began at Omaha by most of the carriers with whom he interlined freight. Burlington and Santa Fe continued to interchange traffic and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Sturm. In June, 1955, at both Sioux City and Omaha, he interchanged 400 shipments with Watson. This dropped to nothing in 1956. In June, 1955, at the same two points, he received from 300 to 500 shipments from Freightways,

and in June, 1956, he interchanged about 5 shipments with this carrier. In the first nine months of 1956, his gross revenue, including interstate and intrastate was \$70,000 less than that for the corresponding period of 1955. He was approached by union representatives, beginning in August, 1955, relative to signing a contract. He was advised by one union representative that a drive was on for memberships in Nebraska and that non-union motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebraska. It operates to and from about 45 points in Nebraska, some of which are not served by any other [fol. 2896] regular route motor carrier. Service is rendered daily out of Omaha and Lincoln. On April 17, 1956, a large number of motor carriers discontinued normal interchange with him at Lincoln and Omaha. In 1955 at these points he received 1215 interstate shipments by interline from other motor carriers, and in 1956 received only 210. Gross revenue of \$205,000 in 1955 dropped to \$156,000 in 1956. On some occasions his driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers' terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with him.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals \$60,000, and forty per cent is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa and Crete, Nebraska.

Tillman operates between Fremont and Lincoln. In 1956, this carrier grossed about \$47,000. Ten per cent of it comes from interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball and McKay.

Peters operates daily between Omaha and Fremont, and transports some interstate traffic between these points. At time of hearing he was still interchanging traffic with Prucka, Burlington and I.N.T. He still interchanges freight now and then with certain other motor carriers, but not as frequent as formerly. Merchants, for example, before

April, 1956, gave him a substantial amount of traffic, but after that time very little. Also, certain traffic which he had received from Independent was given to Joe Ray Freight Line. Most of his present interstate traffic consists of shipments received in Omaha from National Car Loading Company for delivery to Fremont. He grossed about \$20,800 in 1956, which compares favorably with other years, and about 85 per cent of this revenue was derived from interstate business.

Derickson operates daily over U.S. Route 30 between Grand Island and North Platte, and interlines traffic at those points with various motor carriers without difficulty. Numerous consignees route their traffic for ultimate delivery over his line. His competitors over this route consider his service adequate.

[fol. 2897] Steffy operates over routes between Omaha and Creston, Nebraska, and between Dodge, Nebraska and Sioux City, Iowa. Some of his points on and near Nebraska Highway 91, east of Creston, are not served by any other carrier. It interchanges traffic at Omaha with various motor carriers. Its profit in 1955 amounted to about \$6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh and Central City. He serves about 30 Nebraska points regularly and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters Local No. 554 to sign a contract. He inquired whether the Union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the Union to induce Lyon to sign a contract and when these attempts failed, normal interchange ceased at Omaha on March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain

operators continued to interline shipments with him on a regular basis, viz., Box Truck Lines, Inc., Burlington, Ringsby, D.M.T., and National Carloading. Prucka tendered some freight to Lyon during the last week of January 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments, but there have been instances when Lyon has not been given freight by these carriers which was routed over his line. There have been no strikes or labor disputes on Lyon's line, and no pickets were established at his place of business.

Winter operates between Omaha and Lincoln. His interstate traffic is small.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln, Lincoln to Beatrice, and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings, Superior and Franklin, and Fairbury and Franklin. [fol. 2898] The Pawnee Transfer and Superior Transfer operations are not connected by any regular route, but these operations can be connected by the use of certain irregular route authority.

Clark operates over regular routes between Omaha, Lincoln and Sioux City, Iowa, on the one hand, and on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove and Madison. It serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its traffic at Omaha and some at Lincoln. About 90 per cent of its traffic is transported between Omaha and Norfolk. In 1955 Clark grossed \$286,346; 40 per cent from interstate, and 60 per cent from intrastate traffic. In 1956 gross revenue was \$217,412; 4 per cent from interstate and 96 per cent from intrastate. Prior to September, 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955, representatives of Teamsters, (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a con-

tract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955, a picket line was placed at Clark's Omaha terminal. Thereafter deliveries of interchange traffic to this terminal ceased generally. Clark did, where possible, deliver outbound interchange shipments to connecting carriers. On Oct. 1, 1955, Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board. This action culminated in a settlement agreement on Dec. 7, 1955, by representatives of Local 554, Fred L. Clark, and a representative of N.L.R.B. The agreement was approved by the Regional Director of N.L.R.B. Among other things, the agreement provided for the posting of a notice at the business office of Local 554 at Omaha, which in effect stated that the Union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D.M.T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials or commodities, or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark, or to force or require Clark to recognize or bargain with the Union as the collective bargaining representative in accordance with the provisions of Section 9, of N.L.R.B. Act. This notice was placed also at various docks and terminals in Omaha. Thereafter, normal interchange with [fol.2899] most motor carriers was resumed for a while until Clark's interline business dropped noticeably after Jan. 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington and Wilson. Pickets, however, remained at Clark's terminal and were still there in March, 1956, including one of Clark's former employees (employed prior to Sept. 14, 1955). No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On Sept. 14, 1955, he had seven employees.

The Union activity was such that Clark sought relief from National Labor Relations Board, which Board applied for

and obtained a temporary restraining order in United States District Court for Nebraska. The order of the Court, pending final determination of the matter before the Board, was calculated to enjoin picketing at the premises of various motor carriers and shippers who did business with Clark, and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where with Clark or to force or require Clark to recognize or bargain with Teamsters or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters, etc., was certified as the representative of said employees in accordance with Section 9 of National Labor Relations Act. Thereafter Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances were shown where D.M.T., Haeckel, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments. On Dec. 26, 1956, the N.L.R.B. in the proceedings involving Clark and the Union, entered an order requiring Teamsters Local No. 554 to cease and desist from certain unfair labor practices in violation of the National Labor Relations Act.

Generally the stockholders of applicant, with the exception of Clark, have had no dispute with their employees. They are parties to certain tariffs published by rate bureaus [fol. 2900] and have executed concurrences for the interchange of freight on through routes and through rates with various connecting motor carriers, including protesting motor carriers who are also parties to the published tariffs. They hold themselves out to transport interstate freight on a through route rate basis.

Shippers from some fourteen towns and cities in Nebraska supported the application. Shipments of drugs requiring expeditious delivery under refrigeration were delayed; rush order shipments of automotive parts were delayed. The same is true of clothing and drug shipments, butter shipments of the value of \$18,000 to Chicago from a butter factory at Burwell, Nebraska, shipments of leather, newspapers, magazines, catalogues, advertising material, repair parts for farm machinery, truckload shipments of butter from Newman Grove, Nebraska, department store products, hardware store products and farm machinery parts from Sargent, Nebraska, hardware store supplies at Pierce, Nebraska, petroleum products, tires and accessories at Tilden, Nebraska, truck parts at Loup City, Nebraska, emergency shipments of auto parts at Neligh, Nebraska, tire shipments, seed, outboard motors, boats, marine hardware, plumbing fixtures, water softeners and related supplies, heating and air conditioning equipment, and dairy products from Kansas City, Chicago, Des Moines and St. Louis to Norfolk, Nebraska, raw materials for the manufacture of farm and industrial equipment, including corn cribs, grain bins, crop-drying machines and power steering devices from Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Illinois and Hammond, Indiana, to Columbus, Nebraska, products for a chain organization located at Fairbury, Nebraska, receiving a wide range of commodities from Minneapolis, Chicago, Kansas City and St. Louis, wallpaper, floor coverings and other merchandise from St. Louis, Chicago, Lyons and Joliet, Illinois, Kansas City, Minneapolis, St. Paul and Des Moines, Iowa to Fairbury, Nebraska, pump jacks, cylinders, water supply equipment, windmills and plumbing supplies from various scattered centers over the middlewestern and rock mountain states to Fairbury, Nebraska, drugs, department store commodities for Lincoln, Nebraska, heating and air conditioning equipment, various manufactured products, including frames for upholstered furniture, cabinets and television set bases, products for storage in two large warehouses, including products from large tobacco manufacturers and packing houses to, from and into Omaha from various centers over the country. The record is replete

with delays, unnecessary tracing of shipments, inconveniences and losses, all because, as a former owner of [fol. 2901] Independent, testified that his Company, as a result of the fact that Romans had a labor dispute because his employees refused to be organized, was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it, that was their own responsibility."

The record further shows that Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through or to this centrally located city. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union.

The Teamster contracts include what is known as a hot cargo clause, providing as follows:

"It shall not be a violation of this Agreement, and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs, or lockouts exist.

The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or

succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help affect a fair settlement.

The Union shall give the Employer notice of all strikes and/or the intent of the Union to call a strike of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the possession of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

[fol. 2902] The insistence by any employer that his employee handle unfair goods, or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such employer's operations without any need of the Union to go through the grievance procedure herein."

The plaintiffs and intervening plaintiffs' carriers are large trunk line carriers, carrying freight from the entire country to the port of Omaha, and receive and interchange freight at this location from smaller carriers who operate in eastern Nebraska, in joint tariff operations. These smaller carriers use Omaha as a principal or important interchange point, and carry outgoing freight from and deliver incoming freight to a very large number of Nebraska communities. Carriage by motor freight lines furnishes the transportation facilities for most of these communities, and their normal existence depends on the uninterrupted flow of

motor carriage of goods to their stores and factories. These Nebraska carriers, while smaller in the scope of their operations, adequately serve these Nebraska communities. These carriers are non-unionized.

As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in these Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Abler, were not approached until early 1956. The record shows that the Union was not very successful; that in most cases the employees did not respond, and that in every instance the carriers were more than reluctant to accept unionization.

The Union, having no satisfactory success in the Eastern Nebraska field, apparently and very probably started at the other end and began to work through the unionized carriers and put the pressure indirectly on the Eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln and Grand Island.

While some trunkline carriers did not freely admit that their interchange practices after May, 1956, had been materially different from earlier practices, some others freely admitted that they had not been able to interchange with [fol. 2903] Eastern Nebraska carriers in the same free and open way they interchanged prior to 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May, 1956, a deterioration in interchange relationships and a rise in interchange difficulties. These conclusions are heavily confirmed by the testimony and exhibits shown in this record, and no one can seriously contend that the evidence of the Nebraska carriers was not founded on actual experience. The attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others, and the practices varied from almost free and open interchanges to very difficult interchanges. For in-

stance, there is no doubt that some carriers, like Burlington Truck and Santa Fe, accepted almost all traffic offered. But even these carriers did not maintain the same free and open interchange practices in effect before May, 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not normally provide acceptable service for much or most of the traffic which these Eastern Nebraska carriers would normally have handled.

The record shows beyond doubt that so far as those Eastern Nebraska carriers were concerned, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May, 1956. And there can be no doubt that, as a direct result, these Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers, thereby causing a breakdown of service to the public. These matters have been recited above showing inconveniences, delays, loss of interstate revenues, failure of adequate service to the public, etc., all assertedly because of union pressure.

The Nebraska carriers, faced with these problems, got together and formed applicant corporation. The principal purpose of this corporation is that, as a carrier based at Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond. The applicant has no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a union contract containing any hot cargo provisions.

[fol. 2904] The plea of plaintiff and intervening plaintiffs is that they have large investments in their operations, such as terminals, carriage equipment, and the like. There is likewise no doubt that their ability to perform service prior to May 1957 was adequate. The record shows that because of union pressure it was inadequate after that time, and they seek to justify it on the hot cargo clauses

of their contracts with Teamsters Union. Essentially it sounds in confession and avoidance; basing their avoidance on a so-called hot cargo provision in a union contract. Nevertheless, from the examples cited in the record, Clark, in two years of operations, lost heavily. Its interstate traffic fell from 30 per cent of its total traffic in 1954, to 4 per cent in 1956. Two related shipper companies, referred to as Charadon, manufacture furniture. Sales are made in 29 states. Raw materials and supplies are received from one to several points in 23 states. The yearly volume averages 3 million pounds out, and 3.5 million pounds in. Truck service is used for 75 per cent of the outbound, and 40 to 50 per cent of the inbound. These companies had labor difficulties, and as a result had difficulty in getting trucking service for its in and out freight. These companies have been using applicant's temporary service. The Ford Storage and Moving Company and Ford Brothers have two warehouses at Omaha and one at Council Bluffs, Iowa. One principal function is to provide storage for all classes of merchandise. They normally have heavy movements of freight both in and out. From 1952 through 1956 the inbound volume ranged from the equivalent of 575 to 779 carloads. Inbound traffic originates at Chicago, Illinois; Durham, North Carolina; Cincinnati, Ohio; Sioux Falls, South Dakota; and Beloit, Wisconsin. Destinations of outbound traffic are principally Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming and Colorado. On inbound traffic rail service has been heavily used, but there has been a growing tendency toward motor truck service. By early 1956, about 60 per cent of the volume was coming in by truck. On outbound traffic, truck service is more extensively used. Normally the shippers control inbound traffic and these companies control outbound traffic. Everything in transportation was all right there until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford ware-

houses. They were still there at the time of the hearing. [fol. 2905] After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses, and some would not do business with these companies. In addition to the inconveniences and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All these transportation problems came directly or indirectly from labor difficulties with others, which Teamsters Union supported indirectly through refusal of their members who are employees of various trunk carriers to cross picket lines, although not involved in labor troubles with Truckers Union. These companies admit that prior to 1956, the truck service was satisfactory, but they support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored they would still favor applicant's service.

The Broyhill Company, operating a plant at Dakota City for the manufacture of farm equipment, also supported the applicant. Its gross sales in 1956 ran between seven and eight hundred thousand dollars, and greater anticipated sales in 1957. Raw materials come from a number of points spread throughout 20 states. Rail service is used rather extensively on the bulkier inbound commodities, but far less extensively on the outbound traffic. About 60 per cent of outbound traffic moves in truckload lots. About 80 per cent is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of the steel union went on strike and set up picket lines. As a result of the picket lines there have been no pickup or delivery service at the plant since the line appeared. It admits that it had no transportation problem prior to March 14, 1957, and that its service has been generally satisfactory. It nevertheless supports this application upon the theory that there could be no guarantee that it would not have another strike.

These examples of shipper experience are cited to show that there were breakdowns in service because of the failure of trucking companies to serve the public through hot cargo

clauses in their contracts. The trucking companies have no grievances with shippers, but because they have labor contracts with their own employees and the unions to which they belong, they take the attitude that their own labor relations should be first served to the damage and injury of the shipping public to which they owe an almost absolute [fol. 2906] duty to serve under their certificates of convenience and necessity as granted by the Interstate Commerce Commission.

There is no question about carriage by rail. It has always been adequate. The trunkline motor carriers, as a whole, have always been able to provide service to Omaha. Were it not for the effects of union pressure upon these carriers there would have been no material problem. The origin of the problem is in labor pressure. However this may be, these carriers owe a duty to the public to accept traffic irrespective of labor pressure.

The Commission found that applicant was organized as a means of combatting a labor situation arising in the Spring of 1956 which threatened to deprive the Nebraska carriers of much of the interstate traffic which they, before that date, had been handling, and in fact to drive them out of business entirely; that for several years the Nebraska carriers have resisted all attempts on the part of the Teamsters Union to organize their employees; that notwithstanding the almost complete lack, on the part of their employees, for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top"; that is organizational effort should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a union-shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. Their purpose was to accomplish their end by declaring Nebraska carriers "unfair", and the institution of a secondary boycott against their traffic on the part of the larger unionized carriers with which Nebraska carriers were dependent for the handling of interline traffic moving to and from points

beyond Nebraska. The boycott was imposed pursuant to so-called "protection of rights", or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union, or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is involved in any controversy with a union, and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exist. The clause is quoted above.

[fol. 2907] Also that applicant, irrespective of picket lines or other labor difficulties at plants and factories, proposes to render free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring service, regardless of picket lines.

The Commission found that at no time has the boycott against Nebraska Carriers been completely effective in that at no time has the interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from Nebraska carriers more or less regularly when offered, and to have generally maintained normal interline relationships with them. Certain others of the larger unionized carriers have accepted interline freight at times, and refused at other times. Most outbound interline traffic appears to have been disposed of by Nebraska carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the Nebraska carriers and substantial delays in the movement of freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain Nebraska carriers and turned over to them for ultimate delivery to points on their lines, have been turned over to the railroads and non-scheduled

motor carriers with resultant delays in delivery inconvenience and added expense to shippers. The latter stems from the fact that there are no joint rates published for motor-rail movements through Omaha. On the other hand, Nebraska carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all motor traffic moving to and from Nebraska points through Omaha.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application be denied. In so doing, he suggested that an application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced [fol. 2908] by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through peaceful union picket lines, amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

In their replies to the exceptions the opposing carriers and the Union argue generally that the conclusions of the examiner are in accordance with the law and the facts, and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that

the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor-questions presented, or to circumvent the questions by the granting of additional authority such as here sought by applicant; and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the additional motor carrier service proposed, and that it is fit and able properly to conduct an operation of the scope involved.

On June 1, 1959, the Commission, under the facts as herein set out, disagreed with the examiner's conclusions and found unanimously:

"In a situation as here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those who insist that the procedure here adopted, . . . the filing of the instant [fol. 2909] application under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in a service available to a large section of the public, one effective method of correcting the situation is by granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers, does not alter the situation or deprive any carrier of the right to follow the course

here chosen . . . that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Neb., and Chicago, Ill., . . . and return . . . and (2) between Omaha and St. Louis, Mo., from Omaha . . . to Kansas City, Mo. . . . to St. Louis, Mo., and return over the same route . . . serving the intermediate point of Kansas City . . . restricted in each instance, to traffic originating at or destined to points in Nebraska."

The Courts, in numerous decisions, have held that the Commission has a broad discretion in determining the issue of public convenience and necessity under Section 207(a) of the Interstate Commerce Act, and the pertinent portion of the order exercising this discretion has been quoted above. This issue is a matter requiring the exercise of the Commission's expert judgment in the field of transportation. *New York Central Securities Co. v. United States*, 287 U.S. 12, 25; *United States v. Carolina Freight Carriers Corporation*, 315 U.S. 475, 482, 490. In the exercise of this administrative function there are no specifications of consideration by which the Commission is to be governed in determining whether or not public convenience and necessity requires the inauguration of motor carrier service. We point out that this record shows, with abundant evidence, that a deficiency in service to the shipping public of Nebraska continued for over a period of two years because of transportation refusals, disregard of routings, routings by carrier and rail where no joint truck-rail rates were in existence, more expense to shippers, etc., all because of economic and labor pressure on the transportation companies involved. We also point out here that plaintiff, Burlington Truck Lines, Inc., and certain other transportation companies who continued to interchange and accept freight from the Nebraska carriers, will not be affected by this order. Their business has continued, but

because of the fact, either that their transportation facilities were unable to solve the problem when considered in [fol. 2910] the over-all picture, or because of the refusal of many other transportation companies to render the required service, caused the conditions to exist, is a matter for the Commission, in its discretion, to decide. These carriers have interchanged freight from and to Nebraska points during the entire period that applicant has served under its limited temporary authority, and it is reasonable to assume that such interchange will continue in the future. If it does not continue, and even though the resulting competition causes a decrease in revenue to some of the transportation companies, the privilege granted to operate truck lines is in no sense the grant of a monopoly. This is particularly emphasized under Section 207(b) (49 U.S.C. 307 (b)), which provides in substance that any certificate issued shall not confer any proprietary or property rights in the use of the public highways. There is no immunity against future competition. The record shows that the Commission considered the nature of the service rendered by plaintiff and Santa Fe during the period.

The plaintiffs argue that since Burlington and Santa Fe generally maintained normal interline relations during the period in question, and since some of the other plaintiff carriers accepted interline traffic at times, the Commission was not warranted in granting a certificate to the applicant. Although the Commission, in its report of June 1, 1959, in this proceeding (79 M.C.C. 599) took note of these facts, it nevertheless found that the public convenience and necessity required the operation of the applicant. Therefore, the Commission, in reaching its conclusions, took into consideration such service as those carriers continued to render during the period involved, but after weighing the evidence approved the application. Regarding this phase of the case, the Commission had this to say in its report (79 M.C.C. 599, 603):

"At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck

Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and [fol. 2911] substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha."

This is a finding of fact, with all other facts as hereinabove related, and as found by the Commission, constitute the basis on which the Commission entered its order.

The Commission is vested with administrative authority "to draw its conclusions from the infinite variety of circumstances which may occur in specific instances." This is necessarily true since it is the "present or future public convenience and necessity" which the Commission must determine. While it is difficult to forecast future needs, yet the best and safest assurance in all instances is to anticipate what they might be and attempt to meet them. In order to provide required transportation services as

the demands arise, the Commission must exercise a prophetic vision. It cannot stand idly by and wait until the actual needs are present, but must foresee and take proper steps to meet them. Future need is an uncertainty in all instances. The best assurance of an accurate forecast is the considered judgment of the "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454. The adequacy of the existing facilities is not the absolute criterion by which the Commission's action must be guided.

In *Norfolk Southern Bus. Corp. v. United States*, 96 F. Supp., 756, 760, Judge Dobie said:

"There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer & Storage Co. v. United States*, D. C. 42 F. Supp. 215, affirmed, 317 U.S. 587; *A. B. & C. Motor Transp. Co. v. U.S.*, D. C. 69 F. Supp. 166, 169. Section 207(b) of the Interstate Commerce Act, 49 U.S.C.A. 307(b) stated: 'No certificate under this chapter shall confer any proprietary or property rights in the use of the public highways.'"

[fol. 2912] "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See *Chesapeake & Ohio Ry. Co. v. United States*, 283 U.S. 35; *North Coast Transp. Co. v. United States*, 283 U.S. 35; *North Coast Transp. Co. v. United States*, D. C., 54 F. Supp. 448, 451, affirmed 323 U.S. 668. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. *Lang Transp. Corp. v. United States*, D. C., 75 F. Supp. 915, 929; *Inland Motor Freight Lines v. United States*, D. C., 36 F. Supp. 885.

As circuit Judge Parker stated in *Beard-Laney v. United States*, D. C., 83 F. Supp. 27, 32, affirmed 338 U.S. 803: 'It is for the Commission, not the Court, to say what public convenience and necessity requires

and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities.' ”

Moreover, in determining the question of public convenience and necessity the responsibility is that of the Commission and not that of the hearing examiner. Thus, the recommended finding of the hearing examiner that the application should be denied is not binding on the Commission. *Radio Comm. v. Nelson Bros.*, 289 U.S. 266, 285; *Interstate Commerce Commission v. Martin Bros. Box Co.*, 219 F. 2d 811, 812, cert. den., 350 U.S. 823; *Carolina Scenic Coach Co. v. United States*, 56 F. Supp. 801, 805, affirmed 323 U.S. 678; *C. E. Hall & Sons v. United States*, 88 F. Supp. 596, 598; *Inter-City Transp. Co. v. United States*, 89 F. Supp. 441, 445; *Norfolk Sou. Bus Corp. v. United States*, 96 F. Supp. 756, 658, affirmed, 340 U.S. 802; *Illinois California Express, Inc.; et al. v. United States*, 12 Fed. Carr. Cas., par. 81, 183. Under the Interstate Commerce Act, the final grant or denial of applications for operating authority is to be determined by the Commission, not by the hearing examiner.

Plaintiffs allege in their complaints “that Nebraska Short Line Carriers, Inc., failed to prove or establish by clear and convincing evidence that the public could not be or was not being served adequately by existing carriers.” Plaintiffs also allege “that the decision of the Interstate Commerce Commission is based solely and entirely upon allegations that certain shippers were unable to obtain transportation services from some carriers . . . during the period in question.

Complainants’ attack in this regard appears to be directed primarily at the conclusion reached by the Commission upon the evidence. In other words, it seems that the complainants feel that the Court should weigh the evidence and reach a different conclusion from that reached by the Commission.

[fol. 2913] The considerations of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone to decide. *Alton R. Co. v. United States*, 315 U.S. 15, 23; *United States v. Pan-*

American Petroleum Corp., 304 U.S. 156, 158; *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241; *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535.

In *Riss and Co., Inc. v. United States*, 100 F. Supp. 468, affirmed 342 U.S. 937, rehearing denied 343 U.S. 937, the lower court said, (p. 483):

"The Commission is the fact-finding body. The court does not make findings of fact, but simply determines whether or not the Commission's findings are supported by substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its findings, if there is substantial evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the Commission, any more than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury."

In *Virginian Ry. v. United States*, 272 U.S. 658, 663, 665-666, the Supreme Court said:

"... To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. . . This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. . ."

The issue before the Court is simply whether there is rational basis for the Commission's findings. It is not whether this Court may have reached different findings on the record made.

The hearing before the Commission consumed 19 days. The transcript of the evidence from the 75 witnesses who gave testimony consists of 2,886 pages, and there are about 175 exhibits, and we have read and studied the examiner's reports in which the evidence has been detailed and which both sides of this litigation concede to be fairly and accurately stated and from which the Commission found that there was no serious dispute as to the facts.

[fol. 2914] In the two cases pointed out by plaintiff, namely, *H. D. Filson v. Interstate Commerce Commission and United States of America, et al.*, 182 Fed. Supp. 675, and *Hudson Transit Lines, Inc., v. United States*, affirmed 338 U.S. 802, as sustaining its position and contentions for reversal of the Commission's order, it is pertinent to point out that both cases sustained the orders of the Commission, refusing to grant authorization for the new service. In these cases the Commission, under the evidence, found that the existing service was adequate and refused to grant the applications sought, because of failure of proof that public convenience and necessity required the new service and failed to show inadequacy of the existing service. In the latter case the Court does point out that "inadequacy of existing facilities is a basic ingredient in the determination of public 'necessity'", and it does not mean "that the holder of a certificate is entitled to immunity from competition under any and all circumstances", and that the "introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service."

In the opinion of this Court, we find and hold that the order of the Commission is supported by substantial evidence that the service of the existing carriers, under the circumstances here involved, was inadequate, and that the proof in the record shows that the competitive service as here granted is in the public interest.

Another question argued in support of the complaint is that there was a labor dispute which the Commission had no power to adjudicate, the plaintiff asserting that the matter should be presented to the National Labor Relations

Board, under the provisions of the National Labor Relations Act. There is no labor dispute between any employer or employee here. The only labor dispute of which the National Labor Relations Board had jurisdiction to assume was that of Clark, and he did take this matter before that Board and had it adjudicated. As a result of his efforts the Board sought and procured injunctive relief in his behalf. It is rather pressure brought to bear on the Transportation Companies here involved by the labor union to force upon the Nebraska carriers a union shop contract, when the labor union was unable under the law to secure recognition by the Nebraska carriers by reason of their employees refusing to accept the labor union as their bargaining agent. The transportation companies more or less went along with this labor union, and did not require their employees to [fol. 2915] perform the service that these transportation companies were required to render under their certificates of convenience and necessity. They thus find themselves, by reason of their inaction, faced by public demand for additional and other service.

The plaintiffs allege in their complaints that the Commission misconceived the purpose and intention of Congress in Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)), which authorizes the grant of motor carrier certificates; that the Commission does not have jurisdiction to deal with labor disputes, or "to remedy alleged problems which arise as a result of labor disputes"; and that Section 212 of the Interstate Commerce Act (49 U.S.C. 312) "is the only remedy provided by said Act for wilful breaches of duty by interstate carriers", and that said Act "does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty to existing carriers alleged to have violated their duty to the public".

It is true that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common car-

riers in relation to their obligations to the public under that Act. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission has both power and duty to authorize such additional motor carrier service as may be necessary to carry out the purposes of the national transportation policy. It is also true that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

The Commission, in its report in the proceeding here under review (79 M.C.C. 599) had this to say on that subject:

"We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. [fol. 2916] We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot

bargain away their duties and obligations to the public and thereby relieve themselves of such obligations."

The plaintiffs and intervening plaintiff contend that instead of seeking motor carrier authority to serve the area involved the aggrieved parties should have filed complaints with the Interstate Commerce Commission or the National Labor Relations Board, and that the grant of a motor carrier certificate to the applicant constituted a penalty upon the plaintiff carriers which the Commission had no legal authority to impose.

These same arguments were made before the Commission in the proceeding under review, but were properly rejected as wholly without merit.

The Commission, in its report of June 1, 1959, in this proceeding (79 M.C.C. 599) fully disposed of these contentions by stating (pp. 612-613):

"In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted—namely, the filing of the instant applications under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen."

Section 207 of the Interstate Commerce Act, directs the Commission, in determining applications for motor carrier certificates of public convenience and necessity, to consider both the present and future public convenience and necessity. In hearing and determining such applications, the Commission often finds that coincident with the filing of an application, existing motor carriers start to provide or offer to provide better service to more shippers. Obviously, [fol. 2917] the Commission is not required to give decisive weight to such a belated zeal to serve the public. Similarly, where existing carriers have gone so far as to subordinate their statutory common carrier service obligations to "hot cargo" clauses, the Commission, in determining the present and future public convenience and necessity, is not required to give controlling weight to a belated cessation of such conduct. It is equally obvious that in determining the public need for service between such major centers as Omaha, on the one hand, and Chicago, St. Louis and Kansas City, the fact that some of the existing carriers provided some of the needed service does not preclude authorization of additional service to insure continuous and sufficient service for all shippers.

Congress has provided limited or qualified monopolies for interstate motor common carriers on the theory that ultimately the public will receive more efficient and more economical service. Conversely, Congress did not abandon free entry into interstate motor transportation, with its inherent safeguard of unrestricted competition, merely to protect a few authorized carriers in serving shippers with large amounts of profitable traffic, or, as here, shippers and connecting carriers who have not been "blackballed" by the union with which such carriers have collective bargaining agreements. Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service.

It may be that in most cases where there has been a showing that existing motor carrier service has been inadequate, the Commission could proceed to compel the existing car-

riers to render adequate service to the shipping public. However, Congress has not limited the Commission to such an approach, and, in hundreds of cases, the Commission has responded to a showing of inadequate service by authorizing a new competitive service. The latter approach both conserves the Commission's regulatory resources and utilizes the beneficial forces of competition. We are aware of no basis for precluding the latter approach to the problem of inadequate service to the public where such inadequacy is created by existing carriers subordinating their public service obligations to their collective bargaining agreements.

In support of their position, the plaintiff carriers argue that they were justified in refusing to interchange shipments [foi, 2918] with other carriers and in refusing to pick up and deliver goods for shippers under the "hot cargo" clauses in their labor contracts. As will be seen from the decisions discussed below there is no merit in this contention.

The Supreme Court in its decision in *Local 1766, United Brotherhood of Carpenters and Joiners of America, A.F.L. v. National Labor Relations Board*, 357 U.S. 93; stated:

"Since the *Genuine Parts* decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations,

a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods of a shipper. Since he cannot effectively consent, there is, under Sec. 8(b)(4)(A), a "strike or concerted refusal", and a "forcing or requiring" of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a 'strike or concerted refusal,' or a 'forcing or requiring' of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner

proscribed by Sec. 8(b)(4)(A). Common factors may emerge in the adjudication of these questions involving independent considerations. This is made clear by a situation in which the carrier has freely agreed with the union to engage in a boycott. He may have failed in his obligations under the Interstate Commerce Act, but there clearly is no violation of Sec. 8(b)(4)(A); there has been no prohibited inducement of employees."

In *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Railway Co.*, D.C. 105 F. Supp. 794, affirmed 215 F. 2d 126, the Court held that the railroad defendant was not relieved of its duty to furnish cars to a shipper because of a strike at the latter's plant. The Court had this to say (p. 802):

"The undeniable fact is that the railroad company took no affirmative steps whatsoever to comply with its duty as a common carrier, and did nothing to insist and demand that the strikers should not interfere with the performance of that duty. . . . Instead of attempting to obey the law of the land, the defendant assumed to consider the wishes and the demands of the striking Union as being paramount. To condone defendant's failure to perform its statutory duty under this evidence would be tantamount to recognition that mob rule had supplanted law and order in this community.

Other cases to the same effect are *Erie Railroad Co. v. Local 1286*, 117 Fed. Supp. 157; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 Fed. Supp. 475, 498; *Consolidated Freight Lines, Inc. v. Dept. of Public Service*, 200 Wash. 659; 94 Pac. 2d 484, 485; *Beck & Gregg Hardware Co. v. Cook*, 82 S.E. 2d 4; *Burlington Transportation Co. et al. v. Hathaway*, 234 Iowa 135, 12 N.W. 2d 167.

In *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, 498-499, the Court said:

"The labor policy of the United States cannot be conceived to authorize setting aside obligations of others by illegal acts of unions or labor leaders. It cannot

authorize violence or threats of violence, picket lines for political purposes, 'secondary' and 'tertiary' boycotts to isolate a single business from the facilities of commerce, or combinations of unions and labor leaders with business concerns such as the railroads and motor truck operators through their respective employees on the ground in line of duty to accomplish any such illegal purposes.

...

The holding out, whether by rail or motor carrier, was not and could not be legally conditioned by any contracts which any of the carriers may have had with its own employees. Working rules or principles within the economy of the carrier would not be permitted to modify its vital obligations. Inadequacy of preparation of any carrier to carry out its engagement for hire made in the public interest might result in the surrender or cancellation of its franchise, but not in a modification of the fundamental duties. Any conditions of this sort would have been illegal.

The rationale of this claim as to the limitation of the 'holding out' is that the carriers are released from these duties outlined above, since the acts and omissions were those of its own employees over which it had no control because the latter indicated a sympathetic disposition not to handle or transport Wards' shipments. If followed, this theory will revolutionize [fol. 2920] the present economic structure. A group of transportation employees can bring all the rail and motor systems to a standstill by refusing to transport articles destined for another country with which the group disagrees. The same ends can be obtained by a picket line dedicated to that end, which transportation workers will not cross. These are not theories, but pragmatic present day problems. Foreign policy, governmental action, political action and the extinction of private business can be controlled by collusive interaction of employees of carriers with outside and unconnected organizations.

The contention, if adopted, would destroy the representation of the employer by his employees dealing with the public or individuals in another line of business. It would wipe out the corporate theory."

The Court, recognizing that its earlier opinion in the *Montgomery Ward* case (128 F. Supp. 475) had been subject "to much interpretation", rendered a clarifying opinion, stated (128 F. Supp. 520):

"The opinion, reduced to its lowest terms, held that each common carrier, whether trucker or railroad, has a duty at common law and under the Interstate Commerce Act, 49 U.S.C.A. 1 et seq., to receive, transport and deliver goods in accordance with its holding out or the engagement of its posted tariff. This duty is almost absolute, since the carrier is excused only if performance is prevented by the act of God or the public enemy. Because neither of these defenses was established, liability was found as to each defendant as to specific goods."

It is clear, we think, from the foregoing decisions that labor disappointments such as those present here, do not constitute a valid excuse for motor carriers to refuse to pick up and deliver shipments tendered to them by shippers which are experiencing labor troubles and whose plants are picketed, or to refuse to interchange shipments with other carriers which are not unionized or are not engaged in labor controversies with their employees.

When existing motor carriers fail for any of these reasons to perform their duties and obligations to shippers and other carriers, the Commission is empowered and required to insure adequate motor carrier service through the authorization of additional and appropriate motor carrier certificates of public convenience and necessity, as was done here.

The plaintiffs and plaintiff interveners seek to have this Court set aside the Commission's order granting motor carrier authority to the applicant on the grounds that the plaintiff carriers have now resumed the motor carrier service which they discontinued in deference to union con-

tracts and pressures, and that Congress subsequently passed the Labor Management Reporting and Disclosure Act of 1959, commonly referred to as the Landrum-Griffin bill, Section 703 of which undertakes to outlaw "hot cargo" clauses. They contend that these developments render the issues moot.

[fol. 2921] With respect to the first contention, the Commission in its report of June 1, 1959, in the instant proceeding found (79 M.C.C. 599, 613) that the labor difficulties in question "were continuing to be experienced up to and including the time of the hearing." Moreover, in other proceedings where the labor difficulties under consideration had actually ceased at the time of the hearing, the Commission held that the issues were not moot. *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719; *Montgomery Ward & Co., Inc. v. Santa Fe Trail Transportation Co.*, 42 M.C.C. 212; and *Galveston Truck Line Corporation v. Ada Motor Lines, Inc., et al.*, 73 M.C.C. 617. The Commission's conclusions in this regard are supported by numerous court decisions.

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, in which it was contended that the issues involving an order of the Commission were moot, the Court said (pp. 515-516):

"... The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

In *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 308, the object of the suit was to obtain the judgment of the court on the legality of an agreement between the railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by

a voluntary dissolution of the agreement, and of the attempt the court said: "... Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.' " ...

Also see *Van de Vegt v. Board of Commissioners*, 55 p. 2d 703, 710; and *United States v. Aluminum Company of America*, 148 F. 2d 416, 448.

In *Walling, Admr. of Wage and Hour Division, U.S. Dept. of Labor v. Haile Gold Mines, Inc.*, 136 F. 2d 102, 105, the Court, in rejecting an argument of mootness, said:

"It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. This is particularly true where the challenged practices are capable of repetition. Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter ... "

In their second argument, the plaintiffs and intervening plaintiffs, in their respective briefs, contend that the passage of the Landrum-Griffin Labor Reform Act, which purports in Section 703 thereof to outlaw "hot cargo" clauses in labor contracts, rendered moot the questions presented by the instant application, and that therefore the Commission's order granting the application should be set aside.

So far as we are aware there has been no court determination, whether or not the act just referred to effectively outlaws "hot cargo" clauses, and many months or years may pass before there is a judicial interpretation of this act. Even if an affirmative determination had been made, we maintain that the enactment of that legislation constitutes no basis for the voidance of the Commission's order granting the motor carrier authority in question.

There is no assurance, therefore, that the public will be protected against future cessations of motor carrier service resulting from labor difficulties such as are present here.

But completely apart from the question as to whether or not the Labor Management Reporting and Disclosure Act of 1939 effectively prohibits the type of concerted union activity which resulted here in the public being deprived of adequate transportation service, the fact remains that the record in this case establishes that some of the plaintiff carriers have elected to ignore their obligations as common carriers and their duties under the Interstate Commerce Act until after the present application was filed. In view of this conduct on the part of these carriers, the Commission was surely justified in issuing an additional common carrier certificate so as to insure that the public will not in the future have to again suffer from inadequate transportation service in this area.

The Commission is not concerned with the contents of the contracts which the carriers have with the labor unions, but the Commission is concerned with the conduct of the carriers in serving the public, without regard to those contracts.

[fol. 2923] The intervening Union argues that granting a certificate of convenience to applicant on the basis of the non union character of applicant and on the basis of secondary boycott activity by a union injects the Commission into the area of labor relations and collective bargaining. In answer to that the Commission says that under its jurisdiction, it cannot consider whether the applicant is union or non-union; that it has no power to regulate employer or employee labor matters; that Congress has vested the power to act in such matters with the National Labor

Relations Board; and that its power to act under the circumstances of this case comes from the Statute of its creation which imposes a duty to see that common-carrier service is rendered to the public; and that whenever there is a failure to render the service for any reason, except an Act of God, or by the public enemy, that it can act to remedy the matter by granting authority such as granted in this case. In answer to the boycott theory, it is sufficient to say that the Courts have held that such provisions in a labor contract are illegal and that Congress has now so determined. The further answer to its theory is that this record, under the facts established, shows no labor dispute between applicant and its employees, or any labor dispute that has not been corrected between the stockholder carriers and their employees. It does show an unsuccessful attempt on the part of the Union to organize the employees of the stockholder, carriers and that by its failure to so do it has effectively destroyed any jurisdiction of the National Labor Relations Board under the Act of its creation.

The facts as herein above set out, and the law as herein announced, are hereby adopted as the findings of fact and conclusions of law.

It Is Therefore Ordered, Adjudged and Decreed that the Order of the Commission be, and the same is hereby affirmed, and it is further Ordered, Adjudged and Decreed that the Complaint of plaintiff, and the Complaints of Intervening Plaintiffs be, and the same are hereby dismissed for want of equity.

Judge Major, Circuit Judge, concurs in the foregoing opinion of District Judge Poos.

[fol. 2924] MERCER, District Judge, Dissenting.

I cannot agree with the decision of the majority of the court and I therefore dissent. I would hold that the order of the Commission granting the certificate of public convenience and necessity to Short Line¹ was entered in viola-

¹ Nebraska Short Line Carriers, Inc.

tion of the Interstate Commerce Act, 49 U.S.C. Sec. 1 et seq., and that the order is therefore null and void.

Contrary to the suggestion of the majority opinion, we are not concerned with the validity of the basic, or evidentiary, findings of fact of the Commission. Plaintiff does not challenge the evidentiary findings and the Commission and the United States are without standing to challenge the validity of their own findings. To some extent, Short Line, as an intervening defendant, has attempted to raise that issue. As a party intervener on the Commission's side of the case, Short Line is in the same boat with the Commission and must sink or swim upon the strength of the findings as they are found and incorporated in the Commission's report.

Two issues are decisive of the case at bar, namely, whether the evidentiary findings of fact of the Commission support its ultimate finding of public convenience and necessity which forms the predicative basis for the Commission order, and, whether the Commission, in entering the order in question, exceeded the power and jurisdiction conferred upon it by Section 207 of the Interstate Commerce Act, 49 U.S.C. 307. In my opinion, the order must fall on each basis.

Beyond cavil, the Commission was not bound by the findings of fact of the examiner, whether evidentiary or ultimate, but it did adopt the evidentiary findings of its hearing examiner in this case. Disagreement with its hearing [fol. 2925] examiner is limited solely to a determination that the ultimate finding and conclusion by the examiner that public convenience and necessity had not been proved was erroneous. Granted that on a mere question of naked power the Commission did have authority to adopt an ultimate finding directly opposed to that recommended by its hearing examiner, but that naked authority is tempered by the legal requirement that the ultimate findings adopted by the Commission be supported by its own evidentiary findings of fact. *Universal Camera Corp., v. N.L.R.B.*, 340 U.S. 474; *United States v. Pierce Auto Lines*, 327 U.S. 515, 533; *I.C.C. v. Parker*, 326 U.S. 60; *Southern Kansas Greyhound Lines v. United States*, D. C. Mo., 134 F. Supp. 502

aff'd. 351 U.S. 921; *Seaboard Air Line Railroad Co. v. United States*, D. C. Va., 131 F. Supp. 129, aff'd. 349 U.S. 902; *Schaffer v. United States*, D.C.S.D., 139 F. Supp. 444, rev'd on other grounds, 35 U.S. 83.

This case arises out of a rather simple situation as the following summary of the findings of the Commission reveal. Its apparent complexity follows from the emotional overtones inherent in the perusal of the seeming overbearing attitude of a labor union in its attempt to enforce its will upon the stockholders of Short Line.

Short Line is a corporation organized by a number of eastern Nebraska carriers who own all of its capital stock.² [fol. 2926] Those carriers are hereinafter sometimes referred to as the stockholder carriers and, individually, as Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Superior, Pawnee, Derickson, Steffy, Wilber and Tillman.

All of the stockholder carriers operate principally between points in the State of Nebraska. All are non-union. Each of them handles both local freight and interstate freight. Each maintains interchange points, principally within Nebraska, for the interchange of interstate freight with line-haul certificated interstate motor carriers. Interstate freight interchange was, from time to time, made with plaintiff, Burlington, the intervening plaintiff-carriers³ and

² These stockholder carriers are John Romans, doing business as Romans Motor Freight, Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, doing business as McKay Freight Line, Waldo W. Winter and Hubert B. Winter, doing business as Winter Bros., Abler Transfer, Inc., Herbert Peters, doing business as Fremont Express Co., Henry G. Frear, doing business as (1) Superior Transfer and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Lewis Steffensmeir and Edward Steffensmeir, doing business as Steffys Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, and Harvey Tillman, doing business as Tillman Transfer Co.

³ Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

other line-haul carriers. Hereinafter, for convenience, Burlington and the intervening plaintiff-carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as Santa Fe, Watson, Red Ball, I.M.F., Independent, Illinois, I.M.L., Navajo and Ringsby, respectively, in the order in which they are listed in footnote 3.

All of the plaintiffs are union carriers, and each has a collective bargaining agreement with the Teamsters Union. At all times material to this case, each of the union contracts contained a so-called hot-cargo clause which provided that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle hot-cargo, ie., freight produced or tendered by any person who was engaged in any labor dispute with the Teamsters or other labor union.

Beginning in 1955, the intervening plaintiff, Local 554,* [fol. 2927] began a drive to organize common carrier employees in the eastern part of the State of Nebraska. The attempt was made to organize a part of the stockholder carriers from the top down, i.e., by persuading the carrier to enter into a union shop agreement with Local 554 under which its employees would be required to become union members. When the union drive failed, normal freight interchange with a part of the stockholder carriers was interrupted. The affected stockholder carriers experienced refusal by certain of the interstate motor carriers, who were a party to the hot-cargo agreements, to pick up freight shipped over the stockholders' lines from points in Nebraska and destined for interstate points outside that State. Some shipments into Nebraska which were routed by the consignee for terminal delivery by the stockholder carriers were diverted from that routing for terminal delivery by other motor carriers or by rail. In many instances delays were experienced by shippers in delivery of goods shipped interstate by them and routed by motor carrier, and in the receipt of merchandise ordered by them for inter-

* General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

state shipment and delivery by motor carrier. Thus, it appears, from the evidence, and the Commission found that Romans, Abler, McKay, Peters, Lyon and Clark experienced a breakdown of interchange of freight and accompanying difficulties to varying degrees. On the other hand, neither Wilber, Tillman, Derickson, Steffy, Winter, Superior nor Pawnee ever experienced any breakdown or interruption of freight interchange.

As a result of the activities of Local 554 and the ensuing interchange interruption experienced by a part of their number, the stockholder carriers incorporated Short Line as an interstate motor carrier. The application for a certificate of public convenience and necessity was then processed with the Commission, seeking authority for Short Line to operate as an interstate carrier of general commodities, with exceptions, over regular routes between [fol. 2928] Omaha and Lincoln, Nebraska, on the one hand, and major mid-west cities and Denver, Colorado, on the other.

The examiner found that the routes designated in the Short Line application were served by other certificated interstate carriers, including the plaintiffs. He also found that the equipment of plaintiffs and other carriers whose routes duplicated those requested by Short Line in its application, was not being operated to capacity and that such carriers could handle additional interstate traffic whenever the same was available. In addition to the large number of certificated motor carriers who serve the points along the routes designated in the Short Line application, the affected area is served by either the Chicago, Rock Island & Pacific Railroad, the Chicago & North Western Railway, the Chicago, Burlington & Quincy Railroad, the Missouri Pacific Railroad or the Union Pacific Railroad. Each of the named railroads appeared in opposition to the application, and each was, as the master found, able and willing to handle less than car load shipments destined for a part of the Nebraska communities included within the area served by the stockholder carriers. In this connection, also, the examiner found that Burlington and Santa Fe were continuing to interchange freight normally with the

stockholder carriers at Omaha and Lincoln on all interstate shipments originating at or destined for delivery to Nebraska points. Interchange was being effected by the affected stockholder carriers with National,⁵ Ringsby, Rock Island,⁶ Bos,⁷ D.M.T.,⁸ and Merchants.⁹

[fol. 2929] The examiner summarized his evidentiary findings on the latter phase of the case in the following language:

"As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with stockholders named therein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging shipments with a considerable number of line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D.M.T. and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder had been able to find a motor carrier willing to accept interstate shipments.

"Although the shipper evidence relating to interior Nebraska points indicates that there have been some delays in transit, principally because shipments had

⁵ National Carloading Company.

⁶ Rock Island Motor Transit Co.

⁷ Bos Truck Lines.

⁸ Des Moines Transportation Company, Inc.

⁹ Merchants Motor Freight, Inc.

been diverted to carriers other than those designated by the consignees, the shipments had been moving through to destination."

Again the examiner found as follows:

"On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic over their respective portions of the routes involved and the shipments are moving through to destination."

Upon the basis of his evidentiary findings as above summarized, the examiner found and concluded that Short Line had failed to establish that the interstate operation which it proposed was required by the present or future public convenience and necessity. The examiner concluded that Short Line's application should be denied.

The Commission adopted the findings of the examiner, including the findings that Burlington, Santa Fe and other motor carriers were continuing normal interchange with the stockholder carriers, that the line-haul motor carriers operated over the routes proposed by Short Line and that [fol. 2930] their equipment was not used to capacity, that the line-haul carriers were enjoying the freight proposed to be handled by Short Line and that freight shipments destined to and from eastern Nebraska points were moving through to their consignment destinations.

Rather than disturbing the findings of the examiner indicative that the equipment and facilities of the certificated line-haul carriers were adequate to serve the routes sought by the Short Line application, the Commission reasoned that public convenience and necessity required allowance of the application because the breakdown of normal interchange relations with a part of the stockholder carriers constituted an abrogation by a part of the line-haul carriers of their duty to the shipping public which their certificates required. Thus, the Commission recognized that the disruption of normal interchange of freight with some

of the stockholder carriers resulted from a labor dispute between such stockholder carriers and Local 554. Although the Commission did not purport to decide the merits of that labor dispute, it reasoned that the certificated union carriers could not bargain away their duty to serve the public by an agreement with a labor union and thus relieve themselves of their obligations to the public as common carriers. The Commission concluded that certain of the line-haul carriers had, in reliance upon the "hot-cargo" clause of their contracts with the Teamsters Union, violated their duty as common carriers to serve the public, and that that violation had created a deficiency in motor service available to Nebraska shippers. Because of that deficiency, the Commission found that the present and future public convenience and necessity required that the Short Line application be allowed. An order was entered accordingly.

I would hold that the order be set aside for the reason that the finding of public convenience and necessity is contrary to the evidentiary findings of the Commission upon which that ultimate finding is based. Upon every application [fol. 2931] for authority to operate as a common carrier by motor vehicle between interstate points, the Commission must determine the adequacy of the facilities of existing carriers as a preface to its decision. In *Filson v. I.C.C.*, D.C. Colo., 182 F. Supp. 675, the court said that "an inadequacy of existing facilities is a basic ingredient" for the determination of the existence of public necessity on a carrier certificate application. In *Hudson Transit Lines v. United States*, S.D.N.Y., 82 F. Supp. 153, aff'd. 338 U.S. 802, the court held that a finding of the inadequacy of existing facilities is essential to support a finding of the Commission of public convenience and necessity for the grant of a competing carrier application. To the same effect are *Schaffer v. United States*, D.C.N.D., 139 F. Supp. 444, rev'd on other grounds, 355 U.S. 83; *Associated Transports, Inc. v. United States*, D.C. Mo., 169 F. Supp. 769; *Inland Motor Freight v. United States*, D.C. Wash., 60 F. Supp. 520; *McLean Trucking Co. v. United States*, D.C.N.C., 63 F. Supp. 829. In reversing the *Schaffer* case, the Supreme

Court said that the relative adequacy of existing service is a significant consideration when interests of competition between carriers are being reconciled with the policy of maintaining over-all sound system of transportation.

In *United States v. Detroit Navigation Co.*, 326 U.S. 236, the court stressed the Commission's findings of inadequacy of existing facilities in reversing a decision setting aside a Commission order granting new operating rights. The application for proposed carriage by water of automobiles from Detroit, Michigan, to other Great Lakes ports was opposed by the Navigation Company which had been previously certified to serve the same ports. The Commission had found that the service by the Navigation Company had been inadequate in peak season because of a shortage of available ships, that most of the Navigation Company's [fol. 2932] ships were, at the time of the application, in the service of the United States as a result of World War II and that post-war production of cars would far exceed the pre-war volume which the Navigation Company had carried, which would, in turn, require added facilities. Those findings were stressed by the Court as support for the Commission's order certifying additional service in competition with the protestant.

In *Norfolk Southern Bus Corp. v. United States*, D.C. Va., 96 F. Supp. 756, aff'd. 340 U.S. 802, the court did say that it was not necessary for the Commission to specifically find that existing service was inadequate before granting a certificate for additional bus service, but that statement must be viewed against the background of the evidence in that case indicating that the service and facilities of existing carriers were inadequate.

We are not here confronted with a mere failure to find, expressly, that the existing carrier facilities and service capabilities are inadequate. What we are confronted with are findings of fact adopted by the Commission which lead to only one conclusion, namely, that existing carrier facilities and service capabilities are adequate. In my opinion, the ultimate finding of public convenience and necessity for granting the Short Line operating rights is diametrically opposed to those basic findings of fact.

[fol. 2946] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The complaint filed by Burlington Truck Lines, Inc., and Exhibits A, B and C attached thereto.

2. The intervening complaints filed by Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

3. The answers of the Interstate Commerce Commission and the United States of America to the complaint filed by Burlington Truck Lines, Inc.

4. The answers of the Interstate Commerce Commission and the United States of America to the intervening complaints filed by Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

5. The answer filed by intervening defendant Nebraska Short Line Carriers, Inc. to the complaint of Burlington Truck Lines, Inc., and the intervening complaints of plaintiffs.

6. The copy of the Report and Order recommended by Donald R. Sutherland, Examiner, served September 3, 1957 in Docket No. MC-116067, Nebraska Short Line Carriers, Inc., Common Carrier Application, certified to the Court by the Secretary of the Interstate Commerce Commission.

7. The copy of the Report and Order recommended by Michael B. Driscoll, Examiner, served August 8, 1957 in Docket MC-116067, Sub 2, Nebraska Short Line Carriers, Inc., Common Carrier Application, certified to the Court by the Secretary of the Interstate Commerce Commission.

[fol. 2947] 8. Report and Order of the Commission, filed and entered June 1, 1959; Order of the Commission entered July 1, 1959; and Order of the Commission entered July 31, 1959 in Docket No. MC-116067, Nebraska Short Line Carriers, Inc., Common Carrier Application, and Docket No. MC-116067 (Sub No. 2), Nebraska Short Line Carriers, Inc., Extension—32 States; and Order of the Commission, entered March 10, 1960; and Corrected Order of the Commission, entered March 10, 1960, in Docket No. MC-116067, Nebraska Short Line Carriers, Inc., Common Carrier Application, all of which were certified to the Court by the Secretary of the Commission.

9. The opinion of the United States District Court for the Southern District of Illinois, Northern Division, in the above captioned matter (Civil Action Docket No. P-2306) filed April 27, 1961 (including majority and dissenting opinions).

III. The following questions are presented by this appeal:

1. Whether temporary interruptions in interlining freight between non-union intrastate motor carriers and some union interstate motor carriers in a particular area arising out of a labor dispute may, consistently with the standards set forth in the Interstate Commerce Act (49 U.S.C. 201 et seq.) and the National Transportation Policy, be made the basis for the grant of permanent operating authority to a non-union carrier in that area.

(a) Whether the Commission's order and ultimate finding of public convenience and necessity was inconsistent with the specific findings adopted by the Commission with respect to the general adequacy of service.

2. Whether the Commission mistakenly used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U.S.C. 307) in a situation where the appropriate remedy, if any, was a proceeding under Section 212 of the Interstate Commerce Act (49 U.S.C. 312) to compel certain carriers to comply with their

obligations under their certificates of public convenience [fol. 2948] and necessity.

Respectfully submitted,

David Axelrod, Jack Goodman, Carl L. Steiner,
Arnold L. Burke, Attorneys for Burlington Truck
Lines, Inc., Santa Fe Trail Transportation Com-
pany, Watson Bros. Transportation Co., Inc., Red
Ball Transfer Co., Interstate Motor Freight Sys-
tem, Inc., Independent Truckers, Inc., Illinois-
California Express, Inc., Interstate Motor Lines,
Inc., Navajo Freight Lines, Inc., and Ringsby
Truck Lines, Inc., Plaintiffs.

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Starr Thomas and Roland J. Lehman, Attorneys for
Santa Fe Trail Transportation Company.

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[fol. 2949] Proof of Service (omitted in printing).

It is no answer to say that existing carriers do not have an absolute monopoly with respect to the routes defined in their respective certificates. Neither, in my opinion, is the fatal defect in the predicative basis of the Commission's order overcome by anything expressed in the National Transportation Policy. The Transportation Policy merely expresses congressional intent that the Commission shall have authority to maintain an integrated system of interstate transportation by balancing the competitive rights of rail, water and motor carrier facilities to fulfill the transportation needs of the public. Both the Policy and Interstate Commerce Act contemplate the granting of limited monopolies. While a carrier may not cite its certificate as a monopoly grant foreclosing the grant of competing rights, it may cite its certificate, in conjunction with evidence of its ability to render adequate service to the shipping public, as persuasive evidence against an application for competing carrier service.

Monopoly grants are tolerated to avoid ruinous competition and unnecessary duplication of service. I would hold that the monopoly rights previously granted to plaintiffs and other interstate carriers are vested rights to the extent that those rights ought not to be ousted or diluted, except upon a finding of inadequacy of existing facilities and of a demonstrated need for competing service as an integral part of a national system of transportation.

I would declare the order under review null and void for the reason that the finding of public convenience and necessity is not supported by the Commission's basic findings of fact.

The more serious aspect of this case, and an issue equally fatal, in my opinion, to the Commission's order, is the question of the jurisdiction of the Commission to enter the order under review. Upon review of the whole case I am convinced that the Commission employed the certification procedures of Section 207 of the Act, for a purpose and in a manner for which the statute was never intended. The hard core of this whole case is one fact, namely, the existence of a labor dispute between Local 544 and certain of the stockholder carriers. Any doubt as to the large effect

of that fact is dispelled by reading the Commission's report. Most significant, I think, is the fact that the Commission found it necessary to devote paragraph after paragraph and several pages of its report to a discussion of the labor aspects of the case and to an explanation that it was not [fol. 2934] deciding that labor issue. In like manner, in approaching the conclusion that the order of the Commission is valid, the majority of the court devotes some 15 typewritten pages of opinion to the labor aspects of the case, to the duty of a common carrier to the public despite labor involvement and to a discussion of the lack of any decision on a labor dispute in the Commission's disposition of this case.

Moving out from the hard core of the existence of a labor dispute, the Commission concluded that plaintiff carriers, notwithstanding their union contract and possible labor involvement, owe a duty to the public which they should not shirk. Upon that conclusion is then erected a finding that some, but not all, of the certificated interstate motor carriers breached that duty which they owed to the public by creating a disruption of normal interchange of freight and, thereby, a deficiency in motor freight service to shippers in a part of Nebraska. Upon the verdict of the guilt of a part of the interstate motor carriers hangs the finding and conclusion that public convenience and necessity requires the certification of Short Line as an additional interstate carrier, to compete with plaintiffs, both the guilty and the innocent, and to compete with the rail facilities which already exist and serve the interstate needs of Nebraska shippers.

I find the suggestion that Burlington, Santa Fe, and the other interstate carriers who continued normal interchange with the stockholder carriers are not affected or injured by the order to be a completely unrealistic concept. As I have previously pointed out the Commission found that these carriers were operating at less than maximum capacity for their equipment and facilities, and that they, along with the other interstate motor carriers had been enjoying the traffic which Short Line sought by its application. The order deprives the guilty and the innocent alike of traffic which they otherwise would enjoy.

[fol. 2935] I think the evil of the order lies in a simple but very significant fact which both the Commission and the majority of this court overlook, namely, that the basic findings of the Commission's report and the evidence adduced before the hearing examiner are geared to the complaint procedures established by Section 212 of the Act, 49 U.S.C. 312, not to the procedure contemplated by the express provisions of Section 207.

The evidence adduced before the examiner tended to prove that some, but not all, of the plaintiffs and other interstate carriers had refused to conduct normal interchange of freight destined to and from destinations within the eastern part of Nebraska. Upon that evidence the Commission rendered its verdict of guilt, making no distinction between the guilty, the semi-guilty, and the innocent. The evidence as to the effect of the disruption of normal interchange by some of the line-haul carriers tended to prove that some, but not all, of the stockholder carriers had lost business and revenue because of the decrease of interstate freight. The shipper evidence supports the finding that some shippers in the area served by the stockholder carriers had incurred increased freight charges and less efficient motor freight service as a result of disruption of normal interchange. Again, the Commission's report makes no distinction between the injured and the uninjured.

The effect of the Commission's order is a *carte blanche* decision that all interstate motor carriers operating through the interchange points used for eastern Nebraska freight are guilty, either actually or vicariously, of a breach of duty owed to the public under their operating certificates for which they would be punished by granting the Short Line application. The benefits of the granting of that application accrue not only to the stockholder carriers who were found to have been injured by the disruption of normal interchange, but, also to the stockholder carriers who had not been injured and who, under the expressed [fol. 2936] finding of the Commission, had no complaint against the interstate carriers.

No case is cited by the Commission or by the majority of this court, and no case has been found, in which the cer-

tification procedure of Section 207 has been employed in this fashion. Cases upon which the Commission relies and which are cited by the majority of this court involved either a complaint proceeding or a civil action for injunctive relief or for damages resulting from the failure of a carrier to render service commensurate with the obligations imposed by its status as a common carrier. *E.g.*, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, D.C. Minn., 105 F. Supp. 794, aff'd as modified, 8 Cir., 215 F. 2d 126; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, D.C. Ore., 128 F. Supp. 475.

The Commission does have the authority under Section 212 of the Act, upon any complaint, after notice and a hearing, to compel a carrier to comply with the Act and with the duties and obligations imposed by its certificate of public convenience and necessity. *E.g.*, *Montgomery Ward & Company v. Santa Fe Trail Transportation Co.*, 46 M.C.C. 212; *Planters Nut & Chocolate Co. v. American Transfer Company*, 31 M.C.C. 719. Section 212 vests the Commission with a wide discretion to penalize violations of the Act and breaches of duty to the shipping public, which includes the suspension or revocation of a certificate previously granted.

The shipper or carrier injured by a violation of the Act by any carrier, or by a breach of the duties and obligations owed by a common carrier to the shipping public may prosecute an action for damages, *e.g.*, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, *supra*, *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, *supra*, or a suit to enjoin continuing unlawful conduct. *E.g.* *Quaker City Motor Parts Co. v. Interstate Motor Freight System*, D.C. Pa., 148 F. Supp. 226.

[fol. 2937] Either a complaint proceeding or a civil action for damages or injunction apparently would be appropriate in this case. As the examiner pointed out in his report, the evidence adduced in this case is geared to the complaint situation, not to the customary certification proceeding under Section 207.

The distinction between a Section 212 proceeding and a civil action for relief, on the one hand, and Section 207

proceeding on the other, is too significant to lightly permit the latter to be used by a disgruntled carrier indiscriminately as an equivalent substitute for the former. The Section 207 proceeding is an *ex parte*, although opponents of an application may appear and resist it. On the other hand, a Section 212 proceeding is an adversary action commenced by a complaint which must specify charges of some illegal action or breach of duty by a named carrier or carriers. As in litigation before the courts, the issues are squarely drawn. Due notice of the complaint and a full opportunity to appear and defend are the minimum requisites for a valid decision of the issues by the Commission. The initial burden of proof is on the complainant.

By contrast, the proceedings before the Commission in this case evince a serious, and I think unwarranted and unlawful, extension of the certification authority granted by Section 207. Here, an *ex parte* application was filed. Upon the hearing upon that application, by evidence adduced, both those stockholder carriers who claimed injury and those who, presumably, felt they might be injured in the future, converted the application into a broad charge of misconduct on the part of the line-haul carriers. I find that approach frightening enough when the question of adequacy of notice, alone, is considered. It becomes even more frightening when the evidence of misconduct of some of the line-haul carriers is made to attach vicariously and detrimentally to those carriers who conducted normal [fol. 2938] interchange.

While it cannot be doubted that the Commission does possess a large discretion to frame its decisions in a manner calculated by it to implement the provisions of the Act, that discretion does not extend to the creation of a new penalty which is not expressly provided by the Act and which the framers of the Act never contemplated. In my opinion, that is what the Commission has done in this case, and its order should not be permitted to stand and become a very dangerous precedent.

Here, the Commission conceded that it was without authority to decide the merits of the dispute between Local 554 and a part of the stockholder carriers and to determine the validity of the "hot-cargo" clause. Yet it took the posi-

tion that it could, nevertheless, find that a breach of duty had been perpetrated as a result of those labor questions by a part of the line-haul carriers serving eastern Nebraska, and, upon that finding, penalize all carriers in that classification by the grant of competing operating rights to Short Line. That is, I think, the crux of the true impact of the labor aspects on this case—they furnished an opportunity for the Commission to assert an authority beyond that granted by the Act.

The old axiom that "the hit dog howls" should be made to apply to this case. If Clark and others have a complaint against some or all of the line-haul carriers, they alone should do the howling. Section 212 of the Act provides them the opportunity to assert that complaint before the Commission and invoke a jurisdiction under which the issues could be decided in an appropriate proceeding. At least, until the complaint procedure has been tested, we should not permit the whole pack to come in asserting that some have been hit and claiming a right, on behalf of the pack, to a remedy which the Act was never intended to provide.

I would declare the Commission's order null and void.

[fol. 2939] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL TRANSPORTATION COMPANY, WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES, INC., and RINGSBY TRUCK LINES, INC., Plaintiffs,

and

GENERAL DRIVERS AND HELPERS UNION, Local 554, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and NEBRASKA SHORT LINE CARRIERS, INC., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed June 22, 1961

I

Notice is hereby given that General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff and Intervener above named, hereby appeal to the Supreme Court of the United States, from the final Order dismissing the Complaints entered in this action on April 27, 1961.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101 (b).

[fol. 2940]

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Complaint filed by Burlington Truck Lines, Inc., and Exhibits A, B and C attached thereto.

2. The Motion to Intervene as a Plaintiff and the Complaint of Intervenor, General Drivers and Helpers Union Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

3. The Answers of the Interstate Commerce Commission and the United States of America to the Complaint filed by Burlington Truck Lines, Inc.

4. The Answers of the Interstate Commerce Commission and the United States of America to the intervening Complaints filed by Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

5. The Answers of the Interstate Commerce Commission and the United States of America to the intervening complaint filed by General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Intervenor.

6. The Answer filed by intervening defendant Nebraska Short Line Carriers, Inc., to the complaint of Burlington Truck Lines, Inc., and the intervening complaints of plaintiffs above named.

7. The copy of the Report and Order recommended by Donald R. Sutherland, Examiner, served September 3, 1957 in Docket No. MC-116067, Nebraska-Short Line Carriers, Inc., Common Carrier Application, certified by the Secre-

[fol. 2941] tary of the Interstate Commerce Commission to the Court.

8. The copy of the Report and Order recommended by Michael B. Driscoll, Examiner, served August 8, 1957 in Docket No. MC-116067, Nebraska Short Line Carriers, Inc., Common Carrier Application, certified by the Secretary of the Interstate Commerce Commission to the Court.

9. Report and Order of the Commission, filed and entered June 1, 1959; Order of the Commission entered July 1, 1959; and Order of the Commission entered July 31, 1959, in Docket No. MC-116067, Nebraska Short Line Carriers, Inc., Carrier Application, and Docket No. MC-116067 (Sub No. 2), Nebraska Short Line Carriers, Inc., Extension—32 States; and Order of the Commission, entered March 10, 1960; and Corrected Order of the Commission, entered March 10, 1960, in Docket No. MC-116067, Nebraska Short Line Carriers, Inc., Common Carrier Application.

10. Opinion of the United States District Court for the Southern District of Illinois, Northern Division, in the above captioned matter (Civil Action Docket No. P-2306) filed April 27, 1961.

III

The following questions are presented by this appeal:

1. Whether or not the matters involved herein are within the exclusive jurisdiction of the National Labor Relations Board and outside the jurisdiction of the Interstate Commerce Commission.

2. Whether or not the issuance of Motor Carrier Certificates by the Interstate Commerce Commission as a result of labor disputes not only exceeds the statutory power of the Commission, but is contrary to the policies of Congress.

3. Whether or not Certificates of convenience and necessity should be granted to applicant carrier because of the non-union character of such carrier.

4. Whether or not temporary interruptions of interlining between non-union intra-state motor carriers and some

union interstate motor carriers in a particular area arising [fol. 2942] out of a labor dispute, may, consistently with the standards set forth in the Interstate Commerce Act and National Transportation Policy be made the basis for the grant of permanent operating authority to a non-union carrier in that area.

a) Whether the Commission's order and ultimate finding of public convenience and necessity was inconsistent with the specific findings with respect to the general adequacy of service adopted by the Commission.

5. Whether the Commission mistakenly used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U.S.C. 307) in a situation where the appropriate remedy, if any, was a proceeding under Section 212 of the Interstate Commerce Act (49 U.S.C. 312) to compel certain carriers to comply with their obligations under their certificates of public convenience and necessity.

Respectfully submitted,

David D. Weinberg, Arnold J. Stern & Lowell R. McConnell, Attorneys for: General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Intervener.

Address: 300 Keeline Building, Omaha 2, Nebraska.

Dated: June 21, 1961.

[fol. 2943] Proof of Service (omitted in printing).

[fol. 2945]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

Civil Action Docket No. P-2306

BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL TRANSPORTATION COMPANY, WATSON BROS. TRANSPORTATION CO., INC., RED BALL TRANSFER CO., INTERSTATE MOTOR FREIGHT SYSTEM, INC., INDEPENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., INTERSTATE MOTOR LINES, INC., NAVAJO FREIGHT LINES, INC., and RINGSBY TRUCK LINES, INC., Plaintiffs,

and

GENERAL DRIVERS AND HELPERS UNION, Local 554, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and NEBRASKA SHORT LINE CARRIERS, INC., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed June 23, 1961

I. Notice is hereby given that Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order dismissing the Complaints entered in this action on April 27, 1961.

This appeal is taken pursuant to 28 U.S.C. Sections 1253 and 2101(b).

[fol. 2951] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION
Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., ET AL., Plaintiffs,
and

GENERAL DRIVERS AND HELPERS UNION, Local 554, affiliated
with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervening Plaintiff,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE
COMMISSION, Defendant,

and

NEBRASKA SHORT LINE CARRIERS, INC.,
Intervening Defendant.

CROSS DESIGNATION BY DEFENDANT INTERSTATE COMMERCE
COMMISSION OF ADDITIONAL PORTIONS OF RECORD TO BE
CERTIFIED ON APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed June 30, 1961

On June 22, 1961, the defendant Interstate Commerce
Commission received a copy of the Notice of Appeal to the
Supreme Court of the United States filed by the interven-
ing plaintiff General Drivers and Helpers Union, Local 554,
affiliated with The International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America, and
[fol. 2952] on June 26, 1961, received a copy of the Notice
of Appeal of the plaintiffs Burlington Truck Lines, Inc.,
et al. Pursuant to Rule 12-1, this defendant cross-design-
ates for certification by the Clerk of this Court to the

Clerk of the Supreme Court of the United States, the following portions of the record in this Court, in addition to those portions specified in the two Notices of Appeal hereinabove referred to:

1. The order, judgment and decree entered by the Court in this action.

2. The Clerk's docket entries in this action.

3. The entire certified transcript of the record in the proceeding before the Interstate Commerce Commission in its Docket No. MC-116067, *Nebraska Short Line Carriers, Inc., Common Carrier Application*, all of which were certified to the Court by the Secretary of the Commission, including the following (but excluding briefs and reply briefs filed with the Commission by the parties):

a. Transcript of the stenographer's notes of hearing held in Docket No. MC-116067 on January 28, 29, 30 and 31, February 1, 5, 6, 7, 8, 11, 12, 13, 14, 15, 19, 20, 21, 22 and 25, 1957.

b. Exhibits 1 to 177, both inclusive, filed at hearings held in Docket No. MC-116067, referred to in a. above.

[fol. 2953] 4. This Cross-Designation of Record.

5. The two Notices of Appeal filed in this action.

Robert W. Ginnane, General Counsel; I. K. Hay, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Appellee Interstate Commerce Commission.

[fol. 2954] Proof of Service (omitted in printing).

[fol. 2956] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

Civil Action No. P-2306

BURLINGTON TRUCK LINES, INC., ET AL., Plaintiffs,

and

GENERAL DRIVERS AND HELPERS UNION, Local 554, affiliated
with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervening Plaintiff,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE
COMMISSION, Defendant,

and

NEBRASKA SHORT LINE CARRIERS, INC.,
Intervening Defendant.

ORDER REGARDING ORIGINAL PAPERS AND EXHIBITS TO BE
SENT TO THE SUPREME COURT OF THE UNITED STATES, ETC.
—Filed and entered July 19, 1961

It appearing necessary and proper, in the opinion of the
undersigned, the presiding judge herein, that original
papers of any kind should be inspected in the Supreme
Court of the United States, in lieu of copies.

It Is Therefore Ordered that said original papers, to-
gether with all exhibits, shall be returned to the Clerk of
this Court after the appeal has been finally determined by
the Supreme Court of the United States.

Entered this 19th day of July, 1961.

Frederick O. Mercer, Presiding Judge.

[fol. 2957] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 2958]

SUPREME COURT OF THE UNITED STATES

Nos. 336 & 337, October Term, 1961

BURLINGTON TRUCK LINES, INC., et al., Appellants,

vs.

UNITED STATES et al., and

GENERAL DRIVERS AND HELPERS UNION, Local 554, etc.,
Appellant,

vs.

UNITED STATES et al.

Appeals from the United States District Court for the
Southern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—January 8, 1962

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

SUPREME COURT. U. S.

Office Supreme Court, U.S.

FILED

AUG 19 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~333~~ 27

**BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL
TRANSPORTATION COMPANY, WATSON BROS. TRANS-
PORTATION CO., INC., RED BALL TRANSFER CO., IN-
TERSTATE MOTOR FREIGHT SYSTEM, INC., INDE-
PENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA
EXPRESS, INC., INTERSTATE MOTOR LINES, INC.,
NAVAJO FREIGHT LINES, INC., AND RINGSBY TRUCK
LINES, INC.,**

Appellants,

AND

**~~GENERAL DRIVERS AND HELPERS UNION, LOCAL 554,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,~~**

Appellant;

vs.

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, AND NEBRASKA SHORT LINE CARRIERS,
INC.,**

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.**

JURISDICTIONAL STATEMENT.

**DAVID AXELROD,
JACK GOODMAN,
CARL L. STEINER,
ARNOLD L. BURKE,
39 South La Salle Street,
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Counsel for Burlington Truck Lines, Inc., et al., Appellants.

**JAMES GILLEN,
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**STARR THOMAS,
ROLAND J. LEHMAN,
80 East Jackson Boulevard,
Chicago 4, Illinois,
Counsel for Santa Fe Trail
Transportation Company,
Appellant.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961.

No. _____

BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL
TRANSPORTATION COMPANY, WATSON BROS. TRANS-
PORTATION CO., INC., RED BALL TRANSFER CO., IN-
TERSTATE MOTOR FREIGHT SYSTEM, INC., INDE-
PENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA
EXPRESS, INC., INTERSTATE MOTOR LINES, INC.,
NAVAJO FREIGHT LINES, INC., AND RINGSBY TRUCK
LINES, INC.,

Appellants,

AND

~~GENERAL DRIVERS AND HELPERS UNION, Local 554,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,~~

~~*Appellant,*~~

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, AND NEBRASKA SHORT LINE CARRIERS,
INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

Appellants, Burlington Truck Lines, Inc., Illinois-Cali-
fornia Express, Inc., Independent Truckers, Inc., Inter-
state Motor Freight System, Inc., Interstate Motor Lines,
Inc., Navajo Freight Lines, Inc., Red Ball Transfer Co.,

Ringsby Truck Lines, Inc., Santa Fe Trail Transportation Company, and Watson Bros. Transportation Co., Inc., appeal from the judgment of the United States District Court for the Southern District of Illinois, Northern Division, entered April 27, 1961, dismissing their complaint to set aside an order of the Interstate Commerce Commission, dated June 1, 1959, authorizing the performance of motor carrier operations in interstate commerce by Nebraska Short Line Carriers, Inc. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31 (advance sheets). A copy of the opinion is attached as Appendix A. The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599, and a copy is attached as Appendix B (Appendix, page 71).

JURISDICTION.

This suit was brought under 28 U. S. C. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 27, 1961, and the Notice of Appeal was filed in that court by appellants on June 23, 1961. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *American Trucking Associations, Inc. v. United States*, 364 U. S. 1; *Schaffer Transportation Company v. United States*, 355 U. S. 83; *M. & M. Transportation Co. v. United States*, 350 U. S. 857.

STATUTES INVOLVED.

Sections 204(c), 207(a) and 212 of the Interstate Commerce Act (49 U. S. C. 304(c), 307(a) and 312); and Section 703 of the Labor-Management Reporting and Disclosure Act of 1959, Section 8(c); 73 Stat. 519, 29 U. S. C. 158(e).

QUESTIONS PRESENTED.

1. Whether temporary service interruptions involving the interchange of freight between non-union motor carriers operating in interstate commerce wholly within the State of Nebraska, and some, but not all, union interstate motor carriers in a particular area arising out of a labor dispute may, consistently with the standards set forth in the Interstate Commerce Act (49 U. S. C. 201 *et seq.*) and the National Transportation Policy, be made the basis for the grant by the Interstate Commerce Commission of permanent operating authority to a non-union carrier in that area.

2. Whether the Commission erroneously used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) where the appropriate remedy, if any, was a proceeding under Sections 204(c) and 212 of the Interstate Commerce Act (49 U. S. C. 304(c) and 312) to compel certain carriers to comply with their obligations under their certificates of public convenience and necessity.

STATEMENT.

Appellants are certificated interstate motor carriers authorized to serve Omaha and other Nebraska points. Nebraska Short Line Carriers, Inc. ("Short Line"), an appellee here and the applicant before the Commission, is a Nebraska corporation organized and owned by twelve

motor carriers operating in interstate commerce wholly within the State of Nebraska. The situation involved in the case had its origin in a labor dispute between Local 554 of the International Brotherhood of Teamsters ("Union") and the twelve stockholder carriers of Short Line.

A number of small eastern Nebraska motor carriers that are not unionized use Omaha, Nebraska as the principal point at which traffic moving from and to points outside Nebraska is interchanged with larger interstate carriers. Beginning as early as 1954 the Union undertook to organize the employees of these Nebraska carriers. When its organizational activities proved unsuccessful for the most part, the Union in 1956 undertook to exert pressure upon the larger organized carriers in an effort to restrict the interchange of freight with the non-union Nebraska carriers at Omaha and some other less important Nebraska interchange points.

The larger interstate carriers are unionized and their collective bargaining agreements with the Union contained the "hot cargo" clause customary at the time, providing that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle freight produced or tendered by any person who was engaged in any labor dispute with the Union. After May, 1956, the Nebraska carriers experienced interchange difficulties with some, but not all, of the interline carriers. These interchange difficulties arose solely as a result of the labor dispute. Accordingly, in June of 1956, the Nebraska carriers organized a Nebraska corporation—Nebraska Short Line Carriers, Inc.—for the purpose of operating in interstate commerce as a motor common carrier of general commodities. In furtherance of its stated purpose, Short Line filed applications with the Interstate Commerce Commission for certificates of public

convenience and necessity. On the basis of Short Line obtaining a certificate of public convenience and necessity from the Commission, the Nebraska carriers would no longer have a need to interchange freight with the larger unionized carriers at Omaha.

On June 22, 1956, Short Line filed its first application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067, authorizing operations in interstate commerce between Denver and Chicago, Omaha and Chicago, Minneapolis and Des Moines, and Council Bluffs, Iowa and St. Louis, over regular routes serving intermediate points. By an order dated September 3, 1957, Examiner Donald R. Sutherland of the Interstate Commerce Commission recommended denial of this application (Appendix C, page 96). On January 10, 1957, Short Line filed its second application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067 (Sub No. 2), authorizing operation by it in interstate commerce between Omaha, Nebraska, on the one hand, and thirty-two states, on the other hand. By an order dated August 8, 1957, Examiner Michael B. Driscoll recommended denial of this application (Appendix D, page 165).

Although the applications were heard on separate records before different Examiners, the Interstate Commerce Commission dealt with them in a single report dated June 1, 1959 (Appendix B, page 71). Examiner Sutherland's decision was reversed in part and affirmed in part. The Commission granted a certificate to Short Line, authorizing operations "between Omaha on the one hand, and, on the other, Chicago, St. Louis and Kansas City, restricted to traffic originated at or destined to points in Nebraska" (Appendix B, pages 92-93). Examiner Driscoll's recom-

mended report and order was affirmed, and the application filed in MC-116067 (Sub No. 2) was denied.

Referring to Examiner Sutherland's recommended report and order in Docket No. MC-116067, the Commission stated that no serious dispute exists as to the facts and therefore the Examiner's statement of facts was adopted (Appendix B, page 79). Examiner Driscoll's findings were also adopted with only slight modifications (Appendix B, page 83). The Examiners' (both Sutherland and Driscoll) findings that appellants Burlington and Santa Fe provided uninterrupted service at all times were therefore adopted by the Commission (Appendix B, page 79, 83; Appendix C, page 138; Appendix D, page 169-170). These two carriers alone serve all of the points embraced within the certificate issued to Short Line (Appendix B, page 92; Appendix C, pages 135, 138). Moreover, the Commission adopted Examiner Driscoll's findings that, prior to the hearing of the second application, Watson Bros. Transportation Co., Inc., Prucka Transportation, Inc. (predecessor to Interstate Motor Freight System, Inc.) and Independent Truckers, Inc. resumed normal interchange practices (Appendix B, page 79; Appendix D, page 183). In addition, the Commission adopted Examiner Sutherland's finding that only a few of Short Line's stockholders experienced any difficulty of any consequence, and that shipments moved "through to destinations" at all times even during the period of the temporary labor dispute (Appendix B, page 79; Appendix C, pages 154-155).

As a result of the Commission's grant of authority to Short Line, appellants brought a timely action to the District Court to set aside the order. The Three-Judge District Court upheld the Commission's order and dismissed the complaint with Judge Mercer dissenting.

QUESTIONS ARE SUBSTANTIAL.

This proceeding involves the first instance in which the Commission has authorized the institution of new motor carrier operations because of temporary and partial deficiencies in service due to labor difficulties. It presents important questions concerning the considerations relevant to a Commission finding that public convenience and necessity require additional motor carrier service, and the relationship of the Commission's certification power under the Interstate Commerce Act to obligations placed upon employers by the Labor Management Relations Act, and the Commission's rôle in attempting to resolve labor disputes.

The facts are not in dispute, and the situation succinctly presented is a simple one: an organizational campaign conducted in Nebraska in 1956 by a Teamsters' local (Union) caused temporary disruptions in the motor carrier operations of some but not all interstate carriers serving Omaha. These temporary disruptions in service were used as the basis for an application for new interstate operating authority; and despite the fact (a) that interline service was available at all times to the Nebraska stockholder carriers (who formed Short Line) as well as to other shippers and receivers of freight in Nebraska, and (b) that the difficulties that had occurred ended in early 1957, these temporary disruptions were relied upon by the Commission to justify its finding of "present and future public convenience and necessity." (Emphasis ours.)

ARGUMENT.

A. Temporary Service Interruptions Involving the Interchange of Freight Between Non-Union Motor Carriers Operating in Interstate Commerce Wholly Within the State of Nebraska and Some But Not All Union Interstate Motor Carriers in a Particular Area Arising Out of a Labor Dispute Cannot Consistently With the Standards Set Forth in the Interstate Commerce Act (49 U. S. C. 201 et seq.) and the National Transportation Policy Be Made the Basis for the Grant of Permanent Operating Authority to a Non-Union Carrier in That Area.

1. The purpose of section 207(a) of the Motor Carrier Act (49 U. S. C. 307(a),* under which a certificate of public convenience and necessity is sought, is to assure the public of adequate common carrier service. Its purpose is not to resolve labor disputes, nor to punish unionized carriers who engaged in good faith collective bargaining with employee

* Sec. 207. [August 9, 1935.] [49 U. S. C. § 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

representatives, nor to reward non-union carriers for carrying on a fight with a union. Despite avowals to the contrary, the Commission's decision is based upon an evaluation of a labor dispute. Some of appellants are said to have violated their duty to the public by allowing a "hot cargo" provision to be included in their collective bargaining agreements with the Union and by declining to interline with the Nebraska carriers declared to be "unfair" by the Union.

As employers in an "industry affecting commerce" appellants are subject to the obligations imposed by the Labor Management Relations Act, 29 U. S. C. 1 *et seq.* These obligations include a duty to engage in good faith collective bargaining with employee representatives on any matters relating to wages, hours and working conditions. The employees of interstate motor carriers, like those of other industries affecting commerce, are entitled to all the rights guaranteed by federal law, and they may seek to bargain concerning matters which, like the "hot cargo" clause, may affect the carrier's service. If the Commission uses its certification power to penalize motor carriers for bargaining on such matters, it exceeds its jurisdiction by employing the certification power to effect the resolution of labor disputes.

In seeking first to obtain and then to enforce the so-called "hot cargo" clauses, the Union acted pursuant to what it apparently conceived the state of the law to be under the Labor Management Relations Act. In 1956 when the occurrence at issue here took place, the National Labor Relations Board had vacillated on the legality of "hot cargo" provisions; the Interstate Commerce Commission had not yet chosen to ignore its decision in the *Montgomery Ward & Co. v. Consolidated Freightways*, 42 M. C. C. 225, which refused to penalize a carrier for its inability to serve premises where a strike was in progress; and there were no authoritative judicial decisions concerning the validity

and enforceability of the "hot cargo" provisions insisted upon by the Union. The "checkered career" of the "hot cargo" clause was reviewed in this Court's definitive decision in *Local 1976 v. N. L. R. B.*, 357 U. S. 93, in 1958, which resolved a conflict between several circuits in favor of the view that the provision was not enforceable. In the absence of authoritative judicial or administrative decisions a carrier, acting upon the advice of counsel, had every right to assume that hasty, ill-timed defiance of Union threats would mean a complete and legal shut down of its operations. As one of the examiners who considered the facts in the instant proceeding put it: "There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just what any reasonable and prudent businessman would have done in the face of these union activities" (Appendix D, page 185). Thus the Commission acted arbitrarily in granting new authority under these circumstances.

In situations such as this the Interstate Commerce Act, unlike the Labor Management Relations Act, applies only to carriers, not to their employee representatives, and, therefore, when the Interstate Commerce Commission undertakes to deal with a labor dispute it has jurisdiction over only one side, and its decisions are likely either to be ineffective or to defeat the purposes of both Acts. For example, in the instant case the existing certificated carriers have been criticized because all of them they did not resist the efforts of the Union with complete effectiveness. On the other hand on the West Coast recently a group of motor carriers followed a different procedure, banding together in August and September of 1958 for the purpose of resisting efforts of a union to enforce its demands. The result was a one month cessation of operations. Referring to this West Coast labor dispute in a recommended report and order served June 14, 1961 in *Edwin Carl Johnson*

Common Carrier Application, Docket No. MC-117130, which also involved an application for new operating authority, Examiner David Waters stated:

"The evidence establishes that service ceased at Denver for a period of 32 days, and that the Industrial Commission of Colorado found that such cessation resulted from a 'lock out' by the carriers or employers and not from a 'strike' by the employees. The evidence, therefore, supports the position of Johnson. In this situation Johnson urges that his application should be granted in order that he may provide additional service and thereby insure that the public will be adequately protected for the future. The situation developed out of a labor dispute and resulted in a cessation of operations for about one month; however, the situation was settled over 2 years ago and had not occurred again up to the time of the further hearing in July 1960. Since the situation no longer exists, there is no justification for granting the application of Johnson *in order to protect the shipping public in the future from any cessation of service*. Furthermore, there can be no assurance that Johnson would be able to continue operating in a similar situation growing out of a labor dispute. To grant an application as a result of this situation, now remote, would inflict a service penalty on protestants for a breach of duty of about 1 month, and would apply a harsh remedy to a problem that no longer exists." (Emphasis ours.)

Thus, Examiner Waters of the Interstate Commerce Commission dealing with the West Coast labor dispute chooses to call the cessation of motor carrier operations which resulted from that carrier fight against a union a "breach of duty." In the instant matter, the carriers are penalized for failing to in some way compel their union employees to handle so-called "hot cargo" goods and presumably thereby risk complete and legal cessation of operations. In the *Johnson* case they are found to have been

guilty of a breach of duty for undertaking just such a fight with a union.

Even after enactment of the Landrum Griffin Act which deals with "hot cargo" clauses, a union undertook to obtain a modified "hot cargo" clause. In spite of the fact that Short Line received a certificate to serve a so-called non-union segment of the shipping public, its service has also apparently been affected by recent Teamster actions. (Appendix D, pages 190-191).¹ Whether the effect upon Short Line's service will be temporary or permanent will depend upon future action by the National Labor Relations Board and the Courts. The point is that already Short Line has been the target of union action apparently causing some disruptions in its service.

If the Commission's interpretation of Section 207 of the Interstate Commerce Act is correct, then the disruption in the service of Short Line into Chicago may be the basis for the certification of still another carrier. Since the Commission in effect has held that new carriers may be certificated to serve areas affected by labor disputes without a finding that there is an inadequacy of service, the precedent for such a certification exists. The obvious result would be the unlimited certification of carriers to meet admittedly temporary situations resulting from labor disputes despite the findings of the Examiners, which were adopted by the Commission, that the interruptions in service were temporary and that they affected only some carriers.

1. We do not include reference to the Board's complaint against Local 710 for the purpose of raising the question of the legality of the Teamster or Short Line actions, but merely to show that Short Line like almost every other employer in the United States can have its service affected by the actions of a labor union. Short Line is not immune. The exact legality of the Teamster actions under the Labor Management Relations Act as amended in 1959 is yet to be determined. (Labor-Management Reporting and Disclosure Act of 1959, Section 8(e), Section 703(b), 73 Stat. 519, 29 U. S. C. 158(e), 73 Stat. 543.)

In using Section 207 which contemplates the permanent certification of motor carriers to meet present and future public convenience and necessity, the Commission has misapplied the Act by creating permanent carriers to meet admittedly temporary situations. The Commission thereby defeats rather than effectuates the national transportation policy which seeks to "foster sound economic conditions in transportation and among the several carriers * * *."

The creation of permanent carriers to meet temporary problems will completely disrupt the delicate balance in the competitive situation which has resulted from the many decisions of the Commission evaluating permanent transportation needs. The purpose and objective of the Commission, in accordance with the standards of the statute, is to achieve an appropriate long term balance between the supply of transportation services and the needs of the shipping public. (Appendix D, pages 175-176, 184.) The intent of Congress to achieve this delicate balance in the competitive situation is defeated when the Commission makes permanent grants of authority in an attempt to remedy transitory circumstances which are clearly outside its special competence.

Before the Commission may grant a certificate of public convenience and necessity under section 207(a) of the Interstate Commerce Act, 49 U. S. C. 307(a), it is necessary to consider, among other things, (1) whether the new operation will serve a useful purpose; responsive to a public demand or need; (2) whether this purpose can and will be served as well by existing carriers; and (3) whether it can be served by the applicant for new service without endangering or impairing the operations of existing carriers contrary to the public interest. These guiding principles were stated in an early case, *Pan American Bus Lines*, 1 M. C. C. 190 (1936), and have been followed in hundreds of cases subsequently decided by the Com-

mission. Thus it is not surprising that numerous judicial decisions interpreting the Commission's responsibilities in determining whether a proposed service is required by present and future public convenience and necessity have held that a finding of the inadequacy of existing facilities is essential to support a finding of public convenience and necessity for the grant of new service, *e.g.*, *Filson v. I. C. C.*, 182 F. Supp. 675; *Associated Transports, Inc. v. United States*, 169 F. Supp. 769; *Schaffer v. United States*, 139 F. Supp. 444, reversed on other grounds, 355 U. S. 83; *Hudson Transit Lines v. United States*, 82 F. Supp. 153, affirmed per curiam 338 U. S. 802; *McLean Trucking Co. v. United States*, 63 F. Supp. 829; *Inland Motor Freight v. United States*, 60 F. Supp. 520.

The adequacy of existing service and the effect of new service on existing carriers are relevant matters for the Commission to consider, and it cannot grant new operating authority without supportable findings on these matters unless it bases its determination of public convenience and necessity upon some other reasonable ground, such as the desirability in a particular situation of additional motor carrier competition. See *Schaffer Trans. Co. v. United States*, 355 U. S. 83, 90-93.

A temporary interruption in the service of some of the carriers serving an area does not justify the granting of a certificate of public convenience and necessity, unless the Commission finds that the remaining service is inadequate. It did not do so in this case. The Commission has held on a number of occasions that temporary inadequacies of service during periods of peak demand or, because of emergencies do not warrant the grant of additional authority. Public convenience and necessity, the Commission has held, relates to a demand that is reasonably constant and determinable rather than to the extraordinary peaks that may arise in the course of any business. *Cater's*, 10

M. C. C. 292; *Interstate Transport*, 81 M. C. C. 751; *Southern Tank*, MC 109637 (Sub. No. 85), Aug. 27, 1959, 13 CCH Fed. Car. Cases, Par. 34,707; *Tel-Radio*, 53 M. C. C. 396.

In this case the Commission purported to base its determination of public convenience and necessity on alleged inadequacies in existing service. Yet the findings of the examiners, adopted by the Commission, demonstrate that the alleged inadequacies do not exist and that the Commission's ultimate finding is inconsistent with these specific findings. Certainly, the Commission cannot authorize new service where its own subsidiary findings affirmatively establish the adequacy of existing service.

There is no question that the temporary interchange interruptions for some but not all carriers arose as a result of a labor dispute, and that adequate transportation services were maintained in the area at all times. Not only did the Commission fail to find that service had been inadequate, but in adopting the Examiners' findings, it affirmatively found adequate service existing at all times.

B. The Commission Mistakenly Used the Grant of Additional Operating Authority Under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a Situation Where the Appropriate Remedy, If Any, Was a Proceeding Under Sections 204(c), 212 of the Interstate Commerce Act (49 U. S. C. 304(c) and 312)* to Compel Certain Carriers to Comply With Their Obligations Under Their Certificates of Public Convenience and Necessity.

The situation which gave rise to the filing of the Short Line applications was admittedly temporary and solely as a result of a labor dispute. Moreover only some of the carriers in the affected area were involved. Others either provided service throughout the entire period or corrected their operating difficulties before all of the hearings in the instant matter had been concluded by the Com-

*** SECTION 204**

(c) Upon complaint in writing to the Commission by any person, State Board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

SEC. 212. [August 9, 1935, amended June 29, 1938, September 18, 1940, August 22, 1957.] [49 U. S. C. § 312.] (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission

mission. The grant of authority by the Commission in the instant matter creates a permanent competitor for all of the carriers operating in the area. Thus even those who provided continuous service are penalized. This action by the Commission was improper.

The Commission has broad authority under sections 204(c) and 212 of the Motor Carrier Act (49 U. S. C.

promulgated thereunder or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities, between the same points or within the same territory as authorized in the permit.

304(c), 312), to compel a carrier (on complaint and after notice of hearing) to comply with the Act and with the duties and obligations imposed by its certificates of public convenience and necessity, *e.g.* *Montgomery Ward & Company v. Santa Fe Trail Transportation Co.*, 46 M. C. C. 212; *Planters Nut & Chocolate Co. v. American Transfer Company*, 31 M. C. C. 719. Sections 204(c) and 212 vest a wide discretion in the Commission to penalize violations of the Act and breaches of duty to the shipping public and the Commission clearly has authority to issue an affirmative order directing a carrier to fulfill its obligations under its certificate. In addition, a shipper or carrier injured by any violation of the Act by any carrier, or by a breach of the duties and obligations owed by a common carrier to the shipping public may prosecute an action for damages, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, 105 F. Supp. 794, affirmed as modified, 215 F. 2d 126; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, or a suit to enjoin continuing unlawful conduct, *Quaker City Motor Parts Co. v. Interstate Motor Freight System*, 148 F. Supp. 226.

Either a complaint proceeding before the Commission or a civil action for damages or injunction would be appropriate in this case. The distinction between a sections 204(c) and 212 proceeding and a civil action for relief, on the one hand, and a section 207 proceeding on the other, is a significant one. A complaint proceeding is an adversary proceeding commenced by a complaint which must specify charges of some illegal action on the part of a named carrier or carriers. Here, a broad charge of misconduct on the part of some line-haul carriers was used as the basis for penalizing *all* carriers by the grant of competing rights to Short Line. The Commission's discretion in determining public convenience and necessity does not extend to the creation of new penalties not authorized by law.

The Commission's order in this case is inconsistent with its order in *Galveston Truck Line Corporation Extension*, 79 M. C. C. 619, decided the same day. A similar temporary disruption of service because of union activities was said to be "too remote to form a proper basis for a grant of operating rights to be exercised in the future," 79 M. C. C. 619, 622. The instant case was distinguished on the ground that the labor "difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing." The attempted distinction overlooks the fact that many of the interstate carriers in the present case never interrupted normal interchanges, that *all* interstate carriers were providing full and complete service when Short Line's related application (Sub 2 of the same docket) was heard in April, 1957; and that in both cases the labor difficulties had ceased long prior to the Commission's decision.

CONCLUSION.

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the district court be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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PROOF OF SERVICE.

I, DAVID AXELROD, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 18th day of August, 1961 I served copies of the foregoing Jurisdictional Statement and attached appendices on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid, to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record, as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554,

affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

DAVID AXELROD

Attorney for Burlington Truck Lines, Inc., Santa Fe Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., Appellants.

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APPENDIX A.

Burlington Truck Lines, Inc. et al.

vs.

United States of America and Interstate Commerce
Commission.

194 F. Supp. 31 (Advance Sheets).

Before MAJOR, *Circuit Judge*, and MERCER and POOS,
District Judges.

Poos, D. J.: Burlington Truck Lines, Inc., a Corporation, plaintiff, filed its complaint seeking injunctive relief against Interstate Commerce Commission and the United States to restrain the enforcement of the orders of Interstate Commerce Commission granting a limited certificate of convenience and necessity to Nebraska Short Line Carriers, Inc., in the Commission proceedings entitled, "*Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC 116067."

Jurisdiction is authorized by Title 27, U. S. Code, Sections 1336, 1398, 2284, and 2321 through 2325, inclusive, all of which authorize interested parties to seek relief from a three-judge United States District Court.

PARTIES TO PROCEEDINGS.

The intervening plaintiffs are Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Trucks, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines,

Inc., Ringsby Truck Lines, Inc., and General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The effect of the pleadings of interveners is to adopt the allegations and theory of the plaintiff's complaint.

Plaintiff, and all interveners, except the labor union, are common carriers by motor vehicle in interstate commerce and subject to the Interstate Commerce Act. Plaintiff is authorized to engage in transportation of general commodities to, from and between points in Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska and Wyoming, pursuant to a "Certificate of Public Convenience and Necessity," issued to it by the Interstate Commerce Commission. Its residence and principal offices are located in Galesburg, Knox County, Illinois. Watson Bros. Transportation Company, Inc., The Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., are likewise common carriers and are authorized to do business by virtue of "Certificates of Convenience and Necessity," issued by Interstate Commerce Commission to them in various proceedings and orders of the Commission. Their operations cover the States of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming, and the various business offices of these motor carriers are located at Denver, Colorado, Grand Rapids, Michigan, Omaha, Nebraska, and Salt Lake City, Utah. The application of

Nebraska Short Line Carriers was opposed before the Commission by eighteen motor and rail carriers, and the intervening plaintiffs were included. All class rail carriers in western trunkline territory likewise opposed the application, as did the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local No. 554 thereof.

NATURE OF COMPLAINT.

The complaint alleges that Nebraska Short Line Carriers, Inc., by application filed June 22, 1956, Docket No. MC 116067, sought authority from the Commission to conduct operations as a common carrier in interstate and foreign commerce in the transportation of general commodities, with certain exceptions over irregular routes, between Denver, Colorado and Chicago, Illinois; between Omaha, Nebraska and Chicago, Illinois; between Minneapolis, Minnesota and Des Moines, Iowa; between Council Bluffs, Iowa and St. Louis, Missouri; and between Lincoln, Nebraska and St. Joseph, Missouri, serving intermediate and off route points on said routes; and that by application filed January 10, 1957, Docket No. MC 116067, (Sub. No. 2), sought authority to operate as a common interstate and foreign motor carrier in the transportation of general commodities, with certain exceptions over irregular routes between Omaha, Nebraska, on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming; that in Case No. MC 116067, the hearing examiner by proposed order served September 3, 1957, recommended to the Commission that the application

be denied because Nebraska Short Line Carriers had failed to prove public convenience and necessity, and for the same reason by proposed order served August 8, 1957, in Case No. MC 116067, (Sub. No. 2) recommended that the application be denied; the Commission by order dated June 1, 1959 consolidated both cases and granted authority to applicant to operate as a common carrier by motor vehicle in the transportation of general commodities with certain exceptions over regular route between Omaha, Nebraska and Chicago, Illinois, and between Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate points of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska, but denied the other application for additional rights; that by order dated March 10, 1960, the Commission denied the petitions for reconsideration and/or further hearing as filed by certain protesting carriers including the petition for reconsideration of plaintiff filed on July 27, 1959; and the complaint further alleges that the decision of the Commission is contrary to law for the same fourteen reasons, which, on analysis, challenge the jurisdiction of the Interstate Commerce Commission to enter the order in question under the law and the evidence.

REQUESTED RELIEF.

The relief prayed is for entry of a decree adjudging the orders of Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, to have been entered in violation of the Interstate Commerce Act, and therefore unlawful, null and void, and for such other relief as the court deems meet. The intervening motor carriers adopted the allegations of the complaint. Intervening plaintiff, The General Drivers and Helpers Union, Local 554, allege substantially the same matters as plaintiff, and alleged in addition that the basis for the application of Nebraska

Short Line Carriers, Inc., was a desire to protect itself from the so-called "hot-cargo clause" provision of the labor contract entered into by the union plaintiff and intervening plaintiffs' carriers.

POSITION OF DEFENDANTS AND INTERVENING DEFENDANT.

The defendants and intervening defendant, Nebraska Short Line Carriers, Inc., filed answers to the complaint, intervening carriers' complaints, and to the intervening complaint of Local 554, in and by which all factual allegations were denied and refer to and adopt the record of Interstate Commerce Commission for the complete and accurate facts and findings made by the Commission. They admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the National transportation policy; and admit that the Interstate Commerce Act does not contemplate or provide for issue of certificates of public convenience and necessity as a penalty, but say that the Act does provide for the issuance of certificates when the Commission finds that the service is, or will be required by the present or future convenience and necessity as provided in the Act; and further allege that

the evidence adduced before the Commission, and here under review, established that the present and future convenience and necessity required operation by the applicant of a common motor carrier service between the points and to the extent set forth by the order of the Commission entered in this proceeding; refer the court to the Commission's report and order of June 1, 1959, for the complete and accurate reasons and basis for the grant of the certificate in question; and lastly, they say that the challenged orders of the Commission are lawful and in all respects valid and seek a decree that the relief prayed be denied, and the complaint and intervening complaints be dismissed.

ICC'S FINDINGS OF FACT.

All parties hereto agree the findings of fact, one side of the litigants affirming these facts as justifying the orders, while the other deny that they do.

We are thus required to examine the facts and inquire, under those facts, whether or not there are substantial facts to either affirm or reject the respective orders under the applicable rules of law pertaining thereto.

The allegations of the complaint on which the plaintiff bases its right to relief, all adopted by the intervening plaintiffs, while stated in some fourteen allegations, when analyzed can be stated as based on one general proposition, namely, the questioned authority of the Commission to issue the certificate granted under the Commission's statutory power. All other asserted propositions are urged as a basis for the denial of this power.

SCOPE OF JUDICIAL REVIEW.

We are presented at the outset with the scope of judicial review of orders of the Interstate Commerce Commission. The Supreme Court, in a long line of decisions, has consistently held that orders of the Commission should not

be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings and are supported by substantial evidence, even though the court might reach a different conclusion on the facts presented.

This principle is clearly enunciated in *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547-548; 56 L. Ed. 308, 311; 32 S. Ct. 108, wherein the Court said:

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power (citing cases).

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent. v. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that

its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-87; *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 146. The Commission's judgment is to be exercised in the light of each individual case. The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or inconsistency of decisions which it has rendered. *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663-66; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271.

In *Virginian Ry. v. United States*, 272 U. S. 658, the Court said (pp. 665-666):

• • • This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

Unless there is clear evidence to the contrary, it must be presumed that the Commission has properly performed its official duties; and this presumption supports its official acts. • *United States v. Chemical Foundation*, 272 U. S. 1; *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602.

The National Transportation Policy of Sept. 18, 1940 (49 U. S. C., preceding Sections 1, 301, 901, and 1001), provides:

It is hereby declared to be the national transporta-

tion policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve, the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)) provides in part as follows:

Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . .

HISTORY OF PROCEEDING.

The admitted facts establish that Nebraska Short Line Carriers, Inc., is a corporation organized under Nebraska law on June 14, 1956, with authority to issue 1,000 shares of common, and 500 shares of preferred stock at \$100 per share; that at hearing time \$37,500 of common stock had been issued and held in varying amounts by Romans Motor Freight and other Nebraska intrastate carriers, the officers and owners of which were experienced men and companies in the transportation business of motor common carriers, and all of whom had certificates of convenience and necessity, either from the Nebraska State Railway Commission for intrastate commerce or from Interstate Commerce Commission for interstate traffic movements. All carriers and individual owners holding stock in Nebraska Short Line Carriers, Inc., are non-union motor carriers and operate wholly within certain points in Nebraska. The Nebraska intrastate carriers are Romans Motor Freight, Clark Bros. Transfer, Lyon Transfer, McKay Freight Line, Winter Bros., Abler Transfer, Inc., Fremont Express Co., Superior Transfer, Pawnee Transfer, Derickson Transfer, Steffy's Transfer, Crete and Wilber Freight Lines, and Tillman Transfer Company. The President of applicant is John Romans, the Vice-President is C. C. McKay, the Secretary, Walter F. Clark, and the Treasurer, Royal F. Lyon, and who, with Leonard Abler, constitute the Board of Directors. Most of the stockholding truckers are authorized to transport general commodities with exceptions between certain points in eastern and central Nebraska, including Omaha and Lincoln, and between Grand Island and North Platte. Collectively they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration. The traffic manager was able to secure terminal facilities at Chicago, St. Louis, Kansas

City, Minneapolis and Denver, and found that drivers and plenty of motor vehicles could be procured for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease equipment from its stockholders or other motor carriers. The applicant, if granted authority, proposes to serve the public generally and its general manager indicated that no discrimination would be shown in selecting carriers for traffic interchange.

On January 26, 1957, applicant had total assets of \$32,785; liabilities of \$467; and net worth of \$32,318. By order entered Dec. 4, 1956, temporary authority to applicant was approved upon meeting certain requirements.

In May, 1956, the stockholders, under their carrier rights, began to experience difficulties at Omaha, Lincoln and Grand Island, Nebraska, in respect to interstate traffic normally interchanged at those points with certain motor carriers. Romans was informed, in Omaha, by an official of Independent, that the latter carrier was risking labor trouble with its employees, who are members of Teamster's Union, if normal interchange between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956, were not accepted by that carrier. These shipments were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it did not do so in every instance. Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grand Island, particularly with Red Ball and Watson. Time is consumed in finding motor carriers willing to accept traffic, and Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and

Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application, and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made particularly to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Burlington has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight decreased in 1956 compared to 1955 volume. His gross revenue in 1956 was \$138,775, as against \$159,280 in 1955. Prior to May, 1956, 30 per cent of his traffic consisted of outbound shipments, and 70 per cent was inbound. Presently most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, taken over by Interstate Motor Freight System, Inc., Red Ball, Ringsby, Santa Fe Trail, Watson, Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl Express, Inc., Ideal Truck Line, Iowa-Nebraska Transportation Company, Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company, Wright Motor Freight Lines, now B-C Cartage, D. M. T., Haeckl, Ideal, I. N. T., McMaken, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson and Wright, respectively. These were most of the major motor carriers with whom interchange was affected (sic). After the approximate date of May 7, 1956, these

truck lines would not tender or accept freight from Romans at certain times, and this has continued. Interchange between Romans and Burlington, Santa Fe Trail and Rock Island has continued. Ringsby has also accepted freight.

Romans is non-union. There have been no strikes by his employees, nor have any pickets been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk, Nebraska. It serves Sioux City, Iowa, as well as Omaha. No terminal facilities have been operated by this carrier at Sioux City since March 15, 1956, when certain unionized connecting carriers serving that point discontinued normal interchange operations with him. Shortly thereafter the discontinuance of normal interchange began at Omaha by most of the carriers with whom he interlined freight. Burlington and Santa Fe continued to interchange traffic and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and ~~Strom~~. In June, 1955, at both Sioux City and Omaha, he interchanged 400 shipments with Watson. This dropped to nothing in 1956. In June, 1955, at the same two points, he received from 300 to 500 shipments from Freightways, and in June, 1956, he interchanged about 5 shipments with this carrier. In the first nine months of 1956, his gross revenue, including interstate and intrastate was \$70,000 less than that for the corresponding period of 1955. He was approached by union representatives, beginning in August, 1955, relative to signing a contract. He was advised by one union representative that a drive was on for memberships in Nebraska and that non-union motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebraska. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of

Omaha and Lincoln. On April 17, 1956, a large number of motor carriers discontinued normal interchange with him at Lincoln and Omaha. In 1955 at these points he received 1215 interstate shipments by interline from other motor carriers, and in 1956 received only 210. Gross revenue of \$205,000 in 1955 dropped to \$156,000 in 1956. On some occasions his driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers' terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with him.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals \$60,000, and forty per cent is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa and Crete, Nebraska.

Tillman operates between Fremont and Lincoln. In 1956, this carrier grossed about \$47,000. Ten per cent of it comes from interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball and McKay.

Peters operates daily between Omaha and Fremont, and transports some interstate traffic between these points. At time of hearing he was still interchanging traffic with Prucka, Burlington and I. N. T. He still interchanges freight now and then with certain other motor carriers, but not as frequent as formerly. Merchants, for example, before April, 1956, gave him a substantial amount of traffic, but after that time very little. Also, certain traffic which he had received from Independent was given to Joe Ray Freight Line. Most of his present interstate traffic consists of shipments received in Omaha from National Car Loading Company for delivery to Fremont. He grossed about \$20,800 in 1956, which compares favorably

with other years, and about 85 per cent of this revenue was derived from interstate business.

Derickson operates daily over U. S. Route 30 between Grand Island and North Platte, and interlines traffic at those points with various motor carriers without difficulty. Numerous consignees route their traffic for ultimate delivery over his line. His competitors over this route consider his service adequate.

Steffy operates over routes between Omaha and Creston, Nebraska, and between Dodge, Nebraska and Sioux City, Iowa. Some of his points on and near Nebraska Highway 91, east of Creston, are not served by any other carrier. It interchanges traffic at Omaha with various motor carriers. Its profit in 1955 amounted to about \$6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh and Central City. He serves about 30 Nebraska points regularly and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters Local No. 554 to sign a contract. He inquired whether the Union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the Union to induce Lyon to sign a contract and when these attempts failed, normal interchange ceased at Omaha on March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a

regular basis, viz., Box Truck Lines, Inc., Burlington, Ringsby, D. M. T., and National Carloading. Prucka tendered some freight to Lyon during the last week of January 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments, but there have been instances when Lyon has not been given freight by these carriers which was routed over his line. There have been no strikes or labor disputes on Lyon's line, and no pickets were established at his place of business.

Winter operates between Omaha and Lincoln. His interstate traffic is small.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln, Lincoln to Beatrice, and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings, Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route, but these operations can be connected by the use of certain irregular route authority.

Clark operates over regular routes between Omaha, Lincoln and Sioux City, Iowa, on the one hand, and on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove and Madison, it serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its traffic at Omaha and some at Lincoln. About 90 per cent of its traffic is transported between Omaha and Norfolk. In 1955 Clark grossed \$286,346; 40 per cent from interstate, and 60 per cent from intrastate traffic. In 1956 gross revenue was \$217,412; 4

per cent from interstate and 96 per cent from intrastate. Prior to September, 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955, representatives of Teamsters, (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955, a picket line was placed at Clark's Omaha terminal. Thereafter deliveries of interchange traffic to this terminal ceased generally. Clark did, where possible, deliver out-bound interchange shipments to connecting carriers. On Oct. 1, 1955, Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board. This action culminated in a settlement agreement on Dec. 7, 1955, by representatives of Local 554, Fred L. Clark, and a representative of N. L. R. B. The agreement was approved by the Regional Director of N. L. R. B. Among other things, the agreement provided for the posting of a notice at the business office of Local 554 at Omaha, which in effect stated that the Union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D. M. T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials or commodities, or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark, or to force or require Clark to recognize or bargain with the Union as the collective bargaining representative in accordance with the provisions of Section 9, of N. L. R. B. Act. This notice was placed also at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers

was resumed for a while until Clark's interline business dropped noticeably after Jan. 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington and Wilson. Pickets, however, remained at Clark's terminal and were still there in March, 1956, including one of Clark's former employees (employed prior to Sept. 14, 1955). No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On Sept. 14, 1955, he had seven employees.

The Union activity was such that Clark sought relief from National Labor Relations Board, which Board applied for and obtained a temporary restraining order in United States District Court for Nebraska. The order of the Court, pending final determination of the matter before the Board, was calculated to enjoin picketing at the premises of various motor carriers and shippers who did business with Clark, and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where with Clark or to force or require Clark to recognize or bargain with Teamsters or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters, etc., was certified as the representative of said employees in accordance with Section 9 of National Labor Relations Act. Thereafter Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances were shown where D. M. T., Haeckel, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark

found that the traffic was accepted in some instances and refused at other times. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments. On Dec. 26, 1956, the N. L. R. B. in the proceedings involving Clark and the Union, entered an order requiring Teamsters Local No. 554 to cease and desist from certain unfair labor practices in violation of the National Labor Relations Act.

Generally the stockholders of applicant, with the exception of Clark, have had no dispute with their employees. They are parties to certain tariffs published by rate bureaus and have executed concurrences for the interchange of freight on through routes and through rates with various connecting motor carriers, including protesting motor carriers who are also parties to the published tariffs. They hold themselves out to transport interstate freight on a through route rate basis.

Shippers from some fourteen towns and cities in Nebraska supported the application. Shipments of drugs requiring expeditious delivery under refrigeration were delayed; rush order shipments of automotive parts were delayed. The same is true of clothing and drug shipments, butter shipments of the value of \$18,000 to Chicago from a butter factory at Burwell, Nebraska, shipments of leather, newspapers, magazines, catalogues, advertising material, repair parts for farm machinery, truckload shipments of butter from Newman Grove, Nebraska, department store products, hardware store products and farm machinery parts from Sargent, Nebraska, hardware store supplies at Pierce, Nebraska, petroleum products, tires and accessories at Tilden, Nebraska, truck parts at Loup City, Nebraska, emergency shipments of auto parts at Neligh, Nebraska, tire shipments, seed, outboard motors, boats, marine hardware, plumbing fixtures, water softeners and related supplies, heating and air conditioning equipment,

and dairy products from Kansas City, Chicago, Des Moines and St. Louis to Norfolk, Nebraska, raw materials for the manufacture of farm and industrial equipment, including corn cribs, grain bins, crop-drying machines and power steering devices from Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Illinois and Hammond, Indiana, to Columbus, Nebraska, products for a chain organization located at Fairbury, Nebraska, receiving a wide range of commodities from Minneapolis, Chicago, Kansas City and St. Louis, wallpaper, floor coverings/ and other merchandise from St. Louis, Chicago, Lyons and Joliet, Illinois, Kansas City, Minneapolis, St. Paul and Des Moines, Iowa to Fairbury, Nebraska, pump jacks, cylinders, water supply equipment, windmills and plumbing supplies from various scattered centers over the middlewestern and rocky mountain states to Fairbury, Nebraska, drugs, department store commodities for Lincoln, Nebraska, heating and air conditioning equipment, various manufactured products, including frames for upholstered furniture, cabinets and television set bases, products for storage in two large warehouses, including products from large tobacco manufacturers and packing houses to, from and into Omaha from various centers over the country. The record is replete with delays, unnecessary tracing of shipments, inconveniences and losses, all because a former owner of Independent, testified that his Company, as a result of the fact that Romans had a labor dispute because his employees refused to be organized, was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it, that was their own responsibility."

The record further shows that Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through

or to this centrally located city. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union.

HOT CARGO CLAUSE.

The Teamster contracts include what is known as a hot cargo clause, providing as follows:

It shall not be a violation of this Agreement, and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs, or lockouts exist.

The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help affect a fair settlement.

The Union shall give the Employer notice of all strikes and or the intent of the Union to call a strike

of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the possession of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

The insistence by any employer that his employee handle unfair goods, or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such employer's operations without any need of the Union to go through the grievance procedure herein.

NATURE OF INTERCHANGE OPERATIONS.

The plaintiffs and intervening plaintiffs' carriers are large trunk line carriers, carrying freight from the entire country to the port of Omaha, and receive and interchange freight at this location from smaller carriers who operate in eastern Nebraska, in joint tariff operations. These smaller carriers use Omaha as a principal or important interchange point, and carry outgoing freight from and deliver incoming freight to a very large number of Nebraska communities. Carriage by motor freight lines furnishes the transportation facilities for most of these communities, and their normal existence depends on the uninterrupted flow of motor carriage of goods to their stores and factories. These Nebraska carriers, while smaller in the scope of their operations, adequately serve these Nebraska communities. These carriers are non-unionized.

As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in these Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Abler, were not approached until early 1956. The record shows that the Union was not very successful; that in most cases the employees did not respond, and that in every instance the carriers were more than reluctant to accept unionization.

The Union, having no satisfactory success in the Eastern Nebraska field, apparently and very probably started at the other end and began to work through the unionized carriers and put the pressure indirectly on the Eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln and Grand Island.

While some trunkline carriers did not freely admit that their interchange practices after May, 1956, had been materially different from earlier practices, some others freely admitted that they had not been able to interchange with Eastern Nebraska carriers in the same free and open way they interchanged prior to 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May, 1956, a deterioration in interchange relationships and a rise in interchange difficulties. These conclusions are heavily confirmed by the testimony and exhibits shown in this record, and no one can seriously contend that the evidence of the Nebraska carriers was not founded on actual experience. The atti-

tudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others, and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe, accepted almost all traffic offered. But even these carriers did not maintain the same free and open interchange practices in effect before May, 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not normally provide acceptable service for much or most of the traffic which these Eastern Nebraska carriers would normally have handled.

The record shows beyond doubt that so far as those Eastern Nebraska carriers were concerned, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May, 1956. And there can be no doubt that, as a direct result, these Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers, thereby causing a breakdown of service to the public. These matters have been recited above showing inconveniences, delays, loss of interstate revenues, failure of adequate service to the public, etc., all assertedly because of union pressure.

The Nebraska carriers, faced with these problems, got together and formed applicant corporation. The principal purpose of this corporation is that, as a carrier based at Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond. The applicant has no policy on unionization, but it does have a firm policy to the effect that, under no conditions,

would it ever agree to a union contract containing any hot cargo provisions.

The plea of plaintiff and intervening plaintiffs is that they have large investments in their operations, such as terminals, carriage equipment, and the like. There is likewise no doubt that their ability to perform service prior to May 1957 was adequate. The record shows that because of union pressure it was inadequate after that time, and they seek to justify it on the hot cargo clauses of their contracts with Teamsters Union. Essentially it sounds in confession and avoidance, basing their avoidance on a so-called hot cargo provision in a union contract. Nevertheless, from the examples cited in the record, Clark, in two years of operations, lost heavily. Its interstate traffic fell from 30 per cent of its total traffic in 1954, to 4 per cent in 1956. Two related shipper companies, referred to as Charadon, manufacture furniture. Sales are made in 29 states. Raw materials and supplies are received from one to several points in 23 states. The yearly volume averages 3 million pounds out, and 3.5 million pounds in. Truck service is used for 75 per cent of the outbound, and 40 to 50 per cent of the inbound. These companies had labor difficulties, and as a result had difficulty in getting trucking service for its in and out freight. These companies have been using applicant's temporary service. The Ford Storage and Moving Company and Ford Brothers have two warehouses at Omaha and one at Council Bluffs, Iowa. One principal function is to provide storage for all classes of merchandise. They normally have heavy movements of freight both in and out. From 1952 through 1956 the inbound volume ranged from the equivalent of 575 to 779 carloads. Inbound traffic originates at Chicago, Illinois; Durham, North Carolina; Cincinnati, Ohio; Sioux Falls, South Dakota; and Beloit, Wisconsin. Destinations of outbound traffic are principally

Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming and Colorado. On inbound traffic rail service has been heavily used, but there has been a growing tendency toward motor truck service. By early 1956, about 60 per cent of the volume was coming in by truck. On outbound traffic, truck service is more extensively used. Normally the shippers control inbound traffic and these companies control outbound traffic. Everything in transportation was all right there until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of the hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses, and some would not do business with these companies. In addition to the inconveniences and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All these transportation problems came directly or indirectly from labor difficulties with others which Teamsters Union supported indirectly through refusal of their members who are employees of various truck carriers to cross picket lines, although not involved in labor troubles with Truckers Union. These companies admit that prior to 1956, the truck service was satisfactory, but they support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored they would still favor applicant's service.

The Broyhill Company, operating a plant at Dakota.

City for the manufacture of farm equipment, also supported the applicant. Its gross sales in 1956 ran between seven and eight hundred thousand dollars, and greater anticipated sales in 1957. Raw materials come from a number of points spread throughout 20 states. Rail service is used rather extensively on the bulkier inbound commodities, but far less extensively on the outbound traffic. About 60 per cent of outbound traffic moves in truckload lots. About 80 per cent is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of the steel union went on strike and set up picket lines. As a result of the picket lines there have been no pickup or delivery service at the plant since the line appeared. It admits that it had no transportation problem prior to March 14, 1957, and that its service has been generally satisfactory. It nevertheless supports this application upon the theory that there could be no guarantee that it would not have another strike.

LABOR PRESSURE.

These examples of shipper experience are cited to show that there were breakdowns in service because of the failure of trucking companies to serve the public through hot cargo clauses in their contracts. The trucking companies have no grievances with shippers, but because they have labor contracts with their own employees and the unions to which they belong, they take the attitude that their own labor relations should be first served to the damage and injury of the shipping public to which they owe an almost absolute duty to serve under their certificates of convenience and necessity as granted by the Interstate Commerce Commission.

There is no question about carriage by rail. It has always been adequate. The trunkline motor carriers, as a whole, have always been able to provide service to Omaha.

Were it not for the effects of union pressure upon these carriers there would have been no material problem. The origin of the problem is in labor pressure. However this may be, these carriers owe a duty to the public to accept traffic irrespective of labor pressure.

ORGANIZATION OF APPLICANT.

The Commission found that applicant was organized as a means of combatting a labor situation arising in the Spring of 1956 which threatened to deprive the Nebraska carriers of much of the interstate traffic which they, before that date, had been handling, and in fact to drive them out of business entirely; that for several years the Nebraska carriers have resisted all attempts on the part of the Teamsters Union to organize their employees; that notwithstanding the almost complete lack, on the part of their employees, for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top"; that is organizational effort should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a union shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. Their purpose was to accomplish their end by declaring Nebraska carriers "unfair," and the institution of a secondary boycott against their traffic on the part of the larger unionized carriers with which Nebraska carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to so-called "protection of rights," or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide gen-

erally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union, or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is involved in any controversy with a union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exist. The clause is quoted above.

Also that applicant, irrespective of picket lines or other labor difficulties at plants and factories, proposes to render free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring service, regardless of picket lines.

EFFECTS OF BOYCOTT.

The Commission found that at no time has the boycott against Nebraska carriers been completely effective in that at no time has the interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from Nebraska carriers more or less regularly when offered, and to have generally maintained normal interline relationships with them. Certain others of the larger unionized carriers have accepted interline freight at times, and refused at other times. Most outbound interline traffic appears to have been disposed of by Nebraska carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the Nebraska carriers and substantial delays in the movement of freight. On inbound traffic, shipper routing instructions have been generally ignored, and much

of the interline business previously enjoyed by certain Nebraska carriers and turned over to them for ultimate delivery to points on their lines, have been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience and added expense to shippers. The latter stems from the fact that there are no joint rates published for motor-rail movements through Omaha. On the other hand, Nebraska carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all motor traffic moving to and from Nebraska points through Omaha.

EXAMINER'S RECOMMENDATIONS: CARRIER EXCEPTIONS.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application be denied. In so doing, he suggested that an application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through peaceful union picket lines, amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which

is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

REPLIES TO EXCEPTIONS.

In their replies to the exceptions the opposing carriers and the Union argue generally that the conclusions of the examiner are in accordance with the law and the facts, and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented, or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the additional motor carrier service proposed, and that it is fit and able properly to conduct an operation of the scope involved.

COMMISSION DECISION.

On June 1, 1959, the Commission, under the facts as herein set out, disagreed with the examiner's conclusions and found unanimously:

"In a situation as here presented, there arises a

question as to the proper procedure to secure corrective action. We do not agree with those who insist that the procedure here adopted, * * * the filing of the instant application under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in a service available to a large section of the public, one effective method of correcting the situation is by granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers, does not alter the situation or deprive any carrier of the right to follow the course here chosen * * * that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Neb., and Chicago, Ill., * * * and return * * * and (2) between Omaha and St. Louis, Mo., from Omaha * * * to Kansas City, Mo. * * * to St. Louis, Mo., and return over the same route * * * serving the intermediate point of Kansas City * * * restricted in each instance, to traffic originating at or destined to points in Nebraska."

ICC EXPERTISE.

The Courts, in numerous decisions, have held that the Commission has a broad discretion in determining the issue of public convenience and necessity under Section 207(a) of the Interstate Commerce Act, and the pertinent portion of the order exercising this discretion has been quoted above. This issue is a matter requiring the exercise of the Commission's expert judgment in the field of transportation. *New York Central Securities Co. v. United States*, 287 U. S. 12, 25; *United States v. Carolina Freight Carriers Corporation* [3 Federal Carriers Cases ¶ 804023], 315 U. S. 475, 482, 490. In the exercise of this administrative function there are no specifications of consideration by which the Commission is to be governed in determining whether or not public convenience and necessity requires the inauguration of motor carrier service. We point out that this record shows, with abundant evidence, that a deficiency in service to the shipping public of Nebraska continued for over a period of two years because of transportation refusals, disregard of routings, routings by carrier and rail where no joint truck-rail rates were in existence, more expense to shippers, etc., all because of economic and labor pressure on the transportation companies involved. We also point out here that plaintiff, Burlington Truck Lines, Inc., and certain other transportation companies who continued to interchange and accept freight from the Nebraska carriers, will not be affected by this order. Their business has continued, but because of the fact, either that their transportation facilities were unable to solve the problem when considered in the overall picture, or because of the refusal of many other transportation companies to render the required service, caused the conditions to exist, is a matter for the Commission, in its discretion, to decide. These carriers have interchanged

freight from and to Nebraska points during the entire period that applicant has served under its limited temporary authority, and it is reasonable to assume that such interchange will continue in the future. If it does not continue, and even though the resulting competition causes a decrease in revenue to some of the transportation companies, the privilege granted to operate truck lines is in no sense the grant of a monopoly. This is particularly emphasized under Section 207(b) (49 U. S. C. 307(b)), which provides in substance that any certificate issued shall not confer any proprietary or property rights in the use of the public highways. There is no immunity against future competition. The record shows that the Commission considered the nature of the service rendered by plaintiff and Santa Fe during the period.

The plaintiffs argue that since Burlington and Santa Fe generally maintained normal interline relations during the period in question, and since some of the other plaintiff carriers accepted interline traffic at times, the Commission was not warranted in granting a certificate to the applicant. Although the Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) took note of these facts, it nevertheless found that the public convenience and necessity required the operation of the applicant. Therefore, the Commission, in reaching its conclusions, took into consideration such service as those carrier continued to render during the period involved, but after weighing the evidence approved the application. Regarding this phase of the case, the Commission had this to say in its report (79 M. C. C. 599, 603):

"At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have ac-

cepted interline traffic from the stockholder carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha."

This is a finding of fact, with all other facts as hereinabove related, and as found by the Commission, constitute the basis on which the Commission entered its order.

DISCRETION OF ADMINISTRATIVE BODY.

The Commission is vested with administrative authority "to draw its conclusions from the infinite variety of circumstances which may occur in specific instances." This is necessarily true since it is the "present or future public convenience and necessity" which the Commission must determine. While it is difficult to forecast future needs, yet the best and safest assurance in all instances is to anticipate what they might be and attempt to meet them. In order to

provide required transportation services as the demands arise, the Commission must exercise a prophetic vision. It cannot stand idly by and wait until the actual needs are present, but must foresee and take proper steps to meet them. Future need is an uncertainty in all instances. The best assurance of an accurate forecast is the considered judgment of the "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454. The adequacy of the existing facilities is not the absolute criterion by which the Commission's action must be guided.

In *Norfolk Southern Bus. Corp. v. United States* [7 Federal Carriers Cases ¶ 80,597], 96 F. Supp. 756, 760, Judge Dobie said:

"There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer & Storage Co. v. United States* [3 Federal Carriers Cases ¶ 80,021], DC-Pa. 42 F. Supp. 215, affirmed, ('42) 317 U. S. 587; *A. B. & C. Motor Trans. Co. v. U. S.* [6 Federal Carriers Cases ¶ 80,376], DC-Mass., ('46) 69 F. Supp. 166, 169. Section 207(b) of the Interstate Commerce Act, 49 U. S. C. A. 307(b) stated: 'No certificate under this chapter shall confer any proprietary property rights in the use of the public highways.'"

"Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See *Chesapeake & Ohio Ry. Co. v. United States*, 283 U. S. 35; *North Coast Transp. Co. v. United States*, 283 U. S. 35; *North Coast Transp. Co. v. United States* [4 Federal Carriers Cases ¶ 80,144], D. C. 54 F. Supp. 448, 451 affirmed 323 U. S. 668. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. *Lang Transp. Corp. v. United States* [6 Federal Carriers Cases ¶ 80,477], D. C., 75 F. Supp. 915, 929; *Inland*

Motor Freight Lines v. United States [2 Federal Carriers Cases ¶ 9583], D. C., 36 F. Supp. 885.

"As circuit judge Parker stated in *Beard-Lancy v. United States* [7 Federal Carriers Cases ¶ 80,539], D. C. 83 F. Supp. 27, 32, affirmed 338 U. S. 803: "It is for the Commission, not the Court, to say what public convenience and necessity requires and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities."

Moreover, in determining the question of public convenience and necessity the responsibility is that of the Commission and not that of the hearing examiner. Thus, the recommended finding of the hearing examiner that the application should be denied is not binding on the Commission. *Radio Comm. v. Nelson Bros.*, 289 U. S. 266, 285; *Interstate Commerce Commission v. Martin Bros. Box Co.*, 219 F. 2d 811, 812, cert. den., 350 U. S. 823; *Carolina Scenic Coach Co. v. United States* [4 Federal Carriers Cases ¶ 80,188], 56 F. Supp. 801, 805, affirmed 323 U. S. 678; *C. E. Hall & Sons v. United States* [7 Federal Carriers Cases ¶ 80,587], 88 F. Supp. 596, 598; *Inter-City Transp. Co. v. United States*, 89 F. Supp. 441, 445; *Norfolk Sou. Bus Corp. v. United States* [*supra*], 96 F. Supp. 756, 658, affirmed, 340 U. S. 802; *Illinois California Express, Inc., et al. v. United States*, [12 Federal Carriers Cases ¶ 81,183]. Under the Interstate Commerce Act, the final grant or denial of applications for operating authority is to be determined by the Commission, not by the hearing examiner.

Plaintiffs allege in their complaints "that Nebraska Short Line Carriers, Inc., failed to prove or establish by clear and convincing evidence that the public could not be or was not being served adequately by existing carriers." Plaintiffs also allege "that the decision of the Interstate Commerce Commission is based solely and entirely upon

allegations that certain shippers were unable to obtain transportation services from some carriers . . . during the period in question."

Complainants' attack in this regard appears to be directed primarily at the conclusion reached by the Commission upon the evidence. In other words, it seems that the complainants feel that the Court should weigh the evidence and reach a different conclusion from that reached by the Commission.

The considerations of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone to decide. *Alton R. Co. v. United States* [3 Federal Carriers Cases ¶ 80,013], 315 U. S. 15, 23; *United States v. Pan-American Petroleum Corp.* [1 Federal Carriers Cases ¶ 9518], 304 U. S. 156, 158; *United States v. Detroit Navigation Co.* [5 Federal Carriers Cases ¶ 80,256], 326 U. S. 236, 241; *United States v. Pierce Auto Freight Lines, Inc.* [5 Federal Carriers Cases ¶ 80,281], 327 U. S. 515, 535.

In *Riss and Co., Inc. v. United States* [8 Federal Carriers Cases ¶ 80,729], 100 F. Supp. 468, affirmed 342 U. S. 937, rehearing denied 343 U. S. 937, the lower court said, (p. 483):

"The Commission is the fact-finding body. The court does not make findings of fact, but simply determines whether or not the Commission's findings are supported by substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its findings, if there is substantial evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the

Commission, any more than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury."

In *Virginian Ry. v. United States* [*supra*], 272 U. S. 658, 663, 665-666, the Supreme Court said:

"* * * To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province * * * This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it * * *"

ISSUE.

The issue before the Court is simply whether there is rational basis for the Commission's findings. It is not whether this Court may have reached different findings on the record made.

SUPPORTING EVIDENCE.

The hearing before the Commission consumed 19 days. The transcript of the evidence from the 75 witnesses who gave testimony consists of 2,886 pages, and there are about 175 exhibits, and we have read and studied the examiner's reports in which the evidence has been detailed and which both sides of this litigation concede to be fairly and accurately stated and from which the Commission found that there was no serious dispute as to the facts.

In the two cases pointed out by plaintiff, namely, *H. D. Filson v. Interstate Commerce Commission and United States of America et al.* [14 Federal Carriers Cases ¶ 81,316], 182 F. Supp. 675, and *Hudson Transit Lines, Inc. v. United States* [6 Federal Carriers Cases ¶ 80,503], 82 F.

Supp. 153, affirmed *per curiam* (1919) 338 U. S. 802, as sustaining its position and contentions for reversal of the Commission's order, it is pertinent to point out that both cases sustained the orders of the Commission, refusing to grant authorization for the new service. In these cases the Commission, under the evidence, found that the existing service was adequate and refused to grant the applications sought, because of failure of proof that public convenience and necessity required the new service and failed to show inadequacy of the existing service. In the latter case the Court does point out that "inadequacy of existing facilities is a basic ingredient in the determination of public 'necessity' ", and it does not mean "that the holder of a certificate is entitled to immunity from competition under any and all circumstances", and that the "introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service."

In the opinion of this Court, we find and hold that the order of the Commission is supported by substantial evidence that the service of the existing carriers, under the circumstances here involved, was inadequate, and that the proof in the record shows that the competitive service as here granted is in the public interest.

JURISDICTION OF LABOR DISPUTE.

Another question argued in support of the complaint is that there was a labor dispute which the Commission had no power to adjudicate, the plaintiff asserting that the matter should be presented to the National Labor Relations Board, under the provisions of the National Labor Relations Act. There is no labor dispute between any employer or employee here. The only labor dispute of which the National Labor Relations Board had jurisdiction to

assume was that of Clark, and he did take his matter before that Board and had it adjudicated. As a result of his efforts the Board sought and procured injunctive relief in his behalf. It is rather pressure brought to bear on the Transportation Companies here involved by the labor union to force upon the Nebraska carriers a union shop contract, when the labor union was unable under the law to secure recognition by the Nebraska carriers by reason of their employees refusing to accept the labor union as their bargaining agent. The transportation companies more or less went along with this labor union, and did not require their employees to perform the service that these transportation companies were required to render under their certificates of convenience and necessity. They thus find themselves, by reason of their inaction, faced by public demand for additional and other service.

The plaintiffs allege in their complaints that the Commission misconceived the purpose and intention of Congress in Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)), which authorizes the grant of motor carrier certificates; that the Commission does not have jurisdiction to deal with labor disputes, or "to remedy alleged problems which arise as a result of labor disputes"; and that Section 212 of the Interstate Commerce Act (49 U. S. C. 312) "is the only remedy provided by said Act for wilful breaches of duty by interstate carriers", and that said Act "does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty to existing carriers alleged to have violated their duty to the public".

It is true that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organization affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but the Com-

mission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common carriers in relation to their obligations to the public under that Act. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission has both power and duty to authorize such additional motor carrier service as may be necessary to carry out the purposes of the national transportation policy. It is also true that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

The Commission, in its report in the proceeding here under review (79 M. C. C. 599) had this to say on that subject:

"We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The Act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and they are obligated to

accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations."

The plaintiffs and intervening plaintiff contend that instead of seeking motor carrier authority to serve the area involved the aggrieved parties should have filed complaints with the Interstate Commerce Commission or the National Labor Relations Board, and that the grant of a motor carrier certificate to the applicant constituted a penalty upon the plaintiff carriers which the Commission had no legal authority to impose.

These same arguments were made before the Commission in the proceeding under review, but were properly rejected as wholly without merit.

The Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) fully disposed of these contentions by stating (pp. 612-613):

"In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely, the filing of the instant applications under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situa-

tion is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen."

NEED FOR SERVICE.

Section 207 of the Interstate Commerce Act, directs the Commission, in determining applications for motor carrier certificates of public convenience and necessity, to consider both the present and future public convenience and necessity. In hearing and determining such applications, the Commission often finds that coincident with the filing of an application, existing motor carriers start to provide or offer to provide better service to more shippers. Obviously, the Commission is not required to give decisive weight to such a belated zeal to serve the public. Similarly, where existing carriers have gone so far as to subordinate their statutory common carrier service obligations to "hot cargo" clauses, the Commission, in determining the present and future public convenience and necessity, is not required to give controlling weight to a belated cessation of such conduct. It is equally obvious that in determining the public need for service between such major centers as Omaha, on the one hand, and Chicago, St. Louis and Kansas City, the fact that some of the existing carriers provided some of the needed service does not preclude authorization of additional service to insure continuous and sufficient service for all shippers.

Congress has provided limited or qualified monopolies for interstate motor common carriers on the theory that ultimately the public will receive more efficient and more

economical service. Conversely, Congress did not abandon free entry into interstate motor transportation, with its inherent safeguard of unrestricted competition, merely to protect a few authorized carriers in serving shippers with large amounts of profitable traffic, or as here, shippers and connecting carriers who have not been "blackballed" by the union with which such carriers have collective bargaining agreements. Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service.

It may be that in most cases where there has been a showing that existing motor carrier service has been inadequate, the Commission could proceed to compel the existing carriers to render adequate service to the shipping public. However, Congress has not limited the Commission to such an approach, and, in hundreds of cases, the Commission has responded to a showing of inadequate service by authorizing a new competitive service. The latter approach both conserves the Commission's regulatory resources and utilizes the beneficial forces of competition. We are aware of no basis for precluding the latter approach to the problem of inadequate service to the public where such inadequacy is created by existing carriers subordinating their public service obligations to their collective bargaining agreements.

JUSTIFICATION IN REFUSING TO INTERCHANGE.

In support of their position, the plaintiff carriers argue that they were justified in refusing to interchange shipments with other carriers and in refusing to pick up and deliver goods for shippers under the "hot cargo" clauses in their labor contracts. As will be seen from the decisions discussed below there is no merit in this contention.

The Supreme Court in its decision in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L. v. National Labor Relations Board*, 357 U. S. 93, stated:

“Since the Genuine Parts decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.* [12 Federal Carriers Cases ¶ 34,179], 73 M. C. C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods

of a shipper. Since he cannot effectively consent, there is, under Sec. 8(b)(4)(A), a 'strike or concerted refusal', and a 'forcing or requiring' of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a 'strike or concerted refusal,' or a 'forcing or requiring' of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner proscribed by Sec. 8(b)(4)(A). Common factors may emerge in the adjudication of these questions involving independent considerations. This is made clear by a situation in which the carrier has freely agreed with the union to engage in a boycott. He may have failed in his obligations under the Interstate Commerce Act, but there clearly is no violation of Sec. 8(b)(4)(A); there has been no prohibited inducement of employees."

In *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Railway Co.*, D. C. 105 F. Supp. 794, affirmed 215 F. 2d 126, the Court held that the railroad defendant was not relieved of its duty to furnish cars to a shipper because of a strike at the latter's plant. The Court had this to say (p. 802):

"The undeniable fact is that the railroad company took no affirmative steps whatsoever to comply with its duty as a common carrier, and did nothing to insist

and demand that the strikers should not interfere with the performance of that duty * * * Instead of attempting to obey the law of the land, the defendant assumed to consider the wishes and the demands of the striking Union as being paramount. To condone defendant's failure to perform its statutory duty under this evidence would be tantamount to recognition that mob rule had supplanted law and order in this community."

Other cases to the same effect are *Erie Railroad Co. v. Local 1286*, 117 F. Supp. 157; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* [10 Federal Carriers Cases ¶ 80,879], 128 F. Supp. 475, 498; *Consolidated Freight Lines, Inc. v. Dept. of Public Service*, 200 Wash. 659; 94 Pac. 2d 484, 485; *Beck & Gregg Hardware Co. v. Cook* [10 Federal Carriers Cases ¶ 80,933], 82 S. E. 2d 4; *Burlington Transportation Co. et al. v. Hathaway*, 234 Iowa 135, 12 N. W. 2d 167.

In *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* [*supra*], 128 F. Supp. 475, 498-499, the Court said:

"The labor policy of the United States cannot be conceived to authorize setting aside obligations of others by illegal acts of unions or labor leaders. It cannot authorize violence or threats of violence, picket lines for political purposes, 'secondary' and 'tertiary' boycotts to isolate a single business from the facilities of commerce, or combinations of unions and labor leaders with business concerns such as the railroads and motor truck operators through their respective employees on the ground in line of duty to accomplish any such illegal purposes.

"The holding out, whether by rail or motor carrier, was not and could not be legally conditioned by any contracts which any of the carriers may have had with its own employees. Working rules or principles within the economy of the carrier would not be permitted to modify its vital obligations. Inadequacy of preparation of any carrier to carry out its engagement for hire

made in the public interest might result in the surrender or cancellation of its franchise, but not in a modification of the fundamental duties. Any conditions of this sort would have been illegal.

"The rationale of this claim as to the limitation of the 'holding out' is that the carriers are released from these duties outlined above, since the acts and omissions were those of its own employees over which it had no control because the latter indicated a sympathetic disposition not to handle or transport Wards' shipments. If followed, this theory will revolutionize the present economic structure. A group of transportation employees can bring all the rail and motor systems to a standstill by refusing to transport articles destined for another country with which the group disagrees. The same ends can be obtained by a picket line dedicated to that end, which transportation workers will not cross. These are not theories, but pragmatic present day problems. Foreign policy, governmental action, political action and the extinction of private business can be controlled by collusive interaction of employees of carriers with outside and unconnected organizations.

"The contention, if adopted, would destroy the representation of the employer by his employees dealing with the public or individuals in another line of business. It would wipe out the corporate theory."

The Court, recognizing that its earlier opinion in the *Montgomery Ward* case (128 F. Supp. 475) had been subject "to much interpretation", rendered a clarifying opinion, stated (128 F. Supp. 520):

"The opinion, reduced to its lowest terms, held that each common carrier, whether trucker or railroad, has a duty at common law and under the Interstate Commerce Act, 49 U. S. C. A. 1 *et seq.*, to receive, transport and deliver goods in accordance with its holding out or the engagement of its posted tariff. This duty is almost absolute, since the carrier is excused only if performance is prevented by the act of God or the

public enemy. Because neither of these defenses was established, liability was found as to each defendant as to specific goods."

RIGHT TO REFUSE TENDERED SHIPMENTS.

It is clear, we think, from the foregoing decisions that labor disappointments such as those present here, do not constitute a valid excuse for motor carriers to refuse to pick up and deliver shipments tendered to them by shippers which are experiencing labor troubles and whose plants are picketed, or to refuse to interchange shipments with other carriers which are not unionized or are not engaged in labor controversies with their employees.

When existing motor carriers fail for any of these reasons to perform their duties and obligations to shippers and other carriers, the Commission is empowered and required to insure adequate motor carrier service through the authorization of additional and appropriate motor carrier certificates of public convenience and necessity, as was done here.

EFFECT OF SUBSEQUENT LEGISLATION.

The plaintiffs and plaintiff intervenors seek to have this Court set aside the Commission's order granting motor carrier authority to the applicant on the grounds that the plaintiff carriers have now resumed the motor carrier service which they discontinued in deference to union contracts and pressures, and that Congress subsequently passed the Labor Management Reporting and Disclosure Act of 1959, commonly referred to as the Landrum-Griffin bill, Section 703 of which undertakes to outlaw "hot cargo" clauses. They contend that these developments render the issues moot.

With respect to the first contention, the Commission in its report of June 1, 1959, in the instant proceeding found

(79 M. C. C. 599, 613) that the labor difficulties in question "were continuing to be experienced up to and including the time of the hearing." Moreover, in other proceedings where the labor difficulties under consideration had actually ceased at the time of the hearing, the Commission held that the issues were not moot. *Planters Nut & Chocolate Co. v. American Transfer Co.* [3 Federal Carriers Cases ¶ 30,143], 31 M. C. C. 719; *Montgomery Ward & Co., Inc. v. Santa Fe Trail Transportation Co.* [3 Federal Carriers Cases ¶ 30,596], 42 M. C. C. 212; and *Galveston Truck Line Corporation v. Ada Motor Lines, Inc., et al.* [*supra*], 73 M. C. C. 617. The Commission's conclusions in this regard are supported by numerous court decisions.

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, in which it was contended that the issues involving an order of the Commission were moot, the Court said (pp. 515-516):

"* * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

"In *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 308, the object of the suit was to obtain the judgment of the court on the legality of an agreement between the railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: "* * * Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the com-

mencement of the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the Act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case." * * *

Also see *Van de Vegt v. Board of Commissioners*, 55 P. 2d 703, 710; and *United States v. Aluminum Company of America*, 148 F. 2d 416, 448.

In *Walling, Admr. of Wage and Hour Division, U. S. Dept. of Labor v. Haile Gold Mines, Inc.*, 136 F. 2d 102, 105, the Court, in rejecting an argument of mootness, said:

"It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. This is particularly true where the challenged practices are capable of repetition. Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter * * *"

MOOTNESS.

In their second argument, the plaintiffs and intervening plaintiffs, in their respective briefs, contend that the passage of the Landrum-Griffin Labor Reform Act, which purports in Section 703 thereof to outlaw "hot cargo" clauses in labor contracts, rendered moot the questions presented by the instant application, and that therefore the Commission's order granting the application should be set aside.

So far as we are aware there has been no court deter-

mination, whether or not the Act just referred to effectively outlaws "hot cargo" clauses, and many months or years may pass before there is a judicial interpretation of this Act. Even if an affirmative determination had been made, we maintain that the enactment of that legislation constitutes no basis for the voidance of the Commission's order granting the motor carrier authority in question.

There is no assurance, therefore, that the public will be protected against future cessations of motor carrier service resulting from labor difficulties such as are present here.

But completely apart from the question as to whether or not the Labor Management Reporting and Disclosure Act of 1959 effectively prohibits the type of concerted union activity which resulted here in the public being deprived of adequate transportation service, the fact remains that the record in this case establishes that some of the plaintiff carriers have elected to ignore their obligations as common carriers and their duties under the Interstate Commerce Act until after the present application was filed. In view of this conduct on the part of these carriers, the Commission was surely justified in issuing an additional common carrier certificate so as to insure that the public will not in the future have to again suffer from inadequate transportation service in this area.

The Commission is not concerned with the contents of the contracts which the carriers have with the labor unions, but the Commission is concerned with the conduct of the carriers in serving the public, without regard to those contracts.

The intervening Union argues that granting a certificate of convenience to applicant on the basis of the non-union character of applicant and on the basis of secondary boycott activity by a union injects the Commission into the area of labor relations and collective bargaining. In answer to that the Commission says that under its jurisdic-

tion, it cannot consider whether the applicant is union or non-union; that it has no power to regulate employer or employee labor matters; that Congress has vested the power to act in such matters with the National Labor Relations Board; and that its power to act under the circumstances of this case comes from the Statute of its creation which imposes a duty to see that common carrier service is rendered to the public; and that whenever there is a failure to render the service for any reason, except an Act of God, or by the public enemy, that it can act to remedy the matter by granting authority such as granted in this case. In answering to the boycott theory, it is sufficient to say that the Courts have held that such provisions in a labor contract are illegal and that Congress has now so determined. The further answer to its theory is that this record, under the facts established, shows no labor dispute between applicant and its employees, or any labor dispute that has not been corrected between the stockholder carriers and their employees. It does show an unsuccessful attempt on the part of the Union to organize the employees of the stockholder-carriers and that by its failure to so do it has effectively destroyed any jurisdiction of the National Labor Relations Board under the Act of its creation.

CONCLUSION.

The facts as herein above set out, and the law as herein announced, are hereby adopted as the findings of fact and conclusions of law.

It is Therefore Ordered, Adjudged and Decreed that the Order of the Commission be, and the same is hereby affirmed, and it is further Ordered, Adjudged and Decreed that the Complaint of plaintiff, and the Complaints of Intervening Plaintiffs be, and the same are hereby dismissed for want of equity.

Judge Major, Circuit Judge, concurs in the foregoing opinion of District Judge Poos.

MERCER, DISTRICT JUDGE, DISSENTING:

I cannot agree with the decision of the majority of the court and I therefore dissent. I would hold that the order of the Commission granting the certificate of public convenience and necessity to Short Line¹ was entered in violation of the Interstate Commerce Act, 49 U. S. C. Sec. 1 et seq., and that the order is therefore null and void.

Contrary to the suggestion of the majority opinion, we are not concerned with the validity of the basic, or evidentiary, findings of fact of the Commission. Plaintiff does not challenge the evidentiary findings and the Commission and the United States are without standing to challenge the validity of their own findings. To some extent, Short Line, as an intervening defendant, has attempted to raise that issue. As a party intervener on the Commission's side of the case, Short Line is in the same boat with the Commission and must sink or swim upon the strength of the findings as they are found and incorporated in the Commission's report.

Two issues are decisive of the case at bar, namely, whether the evidentiary findings of fact of the Commission support its ultimate finding of public convenience and necessity which forms the predicative basis for the Commission order, and, whether the Commission, in entering the order in question, exceeded the power and jurisdiction conferred upon it by Section 207 of the Interstate Commerce Act, 49 U. S. C. 307. In my opinion, the order must fall on each basis.

1. Nebraska Short Line Carriers, Inc.

ULTIMATE FINDING NOT SUPPORTED
BY EVIDENTIARY FINDINGS.

Beyond cavil, the Commission was not bound by the findings of fact of the examiner, whether evidentiary or ultimate, but it did adopt the evidentiary findings of its hearing examiner in this case. Disagreement with its hearing examiner is limited solely to a determination that the ultimate finding and conclusion by the examiner that public convenience and necessity had not been proved was erroneous. Granted that on a mere question of naked power the Commission did have authority to adopt an ultimate finding directly opposed to that recommended by its hearing examiner, but that naked authority is tempered by the legal requirement that the ultimate findings adopted by the Commission be supported by its own evidentiary findings of fact. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474; *United States v. Pierce Auto Lines* [5 Federal Carriers Cases ¶ 80,281], 327 U. S. 515, 533; *I. C. C. v. Parker* [4 Federal Carriers Cases ¶ 80,221], 326 U. S. 60; *Southern Kansas Greyhound Lines v. United States* [11 Federal Carriers Cases ¶ 81,035], D. C. Mo., 134 F. Supp. 502 aff'd 351 U. S. 921; *Seaboard Air Line Railroad Co. v. United States* [10 Federal Carriers Cases ¶ 80,980], D. C. Va., 131 F. Supp. 129, aff'd 349 U. S. 902; *Schaffer v. United States* [11 Federal Carriers Cases ¶ 81,053], D. C. S. D., 139 F. Supp. 444, rev'd on other grounds, 344 U. S. 83.

This case arises out of a rather simple situation as the following summary of the findings of the Commission reveal. Its apparent complexity follows from the emotional overtones inherent in the persual of the seeming overbearing attitude of a labor union in its attempt to enforce its will upon the stockholders of Short Line.

Short Line is a corporation organized by a number of east-

ern Nebraska carriers who own all of its capital stock.² Those carriers are hereinafter sometimes referred to as the stockholder carriers and, individually, as Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Superior, Pawnee, Derickson, Steffy, Wilber and Tillman.

All of the stockholder carriers operate principally between points in the State of Nebraska. All are non-union. Each of them handles both local freight and interstate freight. Each maintains interchange points, principally within Nebraska, for the interchange of interstate freight with line-haul certified interstate motor carriers. Interstate freight interchange was, from time to time, made with plaintiff, Burlington, the intervening plaintiff-carriers³ and other line-haul carriers. Hereinafter, for convenience, Burlington and the intervening plaintiff-carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as Santa Fe, Watson, Red

2. These stockholder carriers are John Romans, doing business as Romans Motor Freight, Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, doing business as McKay Freight Line, Waldo W. Winter and Hubert B. Winter, doing business as Winter Bros., Abler Transfer Inc., Herbert Peters, doing business as Freemont Express Co., Henry G. Frear, doing business as (1) Superior Transfer and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Lewis Steffensmeir and Edward Steffensmeir, doing business as Steffys Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, and Harvey Tillman, doing business as Tillman Transfer Co.

3. Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

Ball, I. M. F., Independent, Illinois, I. M. L., Navajo and Ringsby, respectively, in the order in which they are listed in footnote 3.

All of the plaintiffs are union carriers, and each has a collective bargaining agreement with the Teamsters Union. At all times material to this case, each of the union contracts contained a so-called hot-cargo clause which provided that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle hot-cargo, i.e., freight produced or tendered by any person who was engaged in any labor dispute with the Teamsters or other labor union.

Beginning in 1955, the intervening plaintiff, Local 554⁴ began a drive to organize common carrier employees in the eastern part of the State of Nebraska. The attempt was made to organize a part of the stockholder carriers from the top down, i.e., by persuading the carrier to enter into a union shop agreement with Local 554 under which its employees would be required to become union members. When the union drive failed, normal freight interchange with a part of the stockholder carriers was interrupted. The affected stockholder carriers experienced refusal by certain of the interstate motor carriers, who were a party to the hot-cargo agreements, to pick up freight shipped over the stockholders' lines from points in Nebraska and destined for interstate points outside that State. Some shipments into Nebraska which were routed by the consignee for terminal delivery by the stockholder carriers were diverted from that routing for terminal delivery by other motor carriers or by rail. In many instances delays were experienced by shippers in delivery of goods shipped interstate by them and routed by motor carrier, and in the

4. General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

receipt of merchandise ordered by them for interstate shipment and delivery by motor carrier. Thus, it appears, from the evidence, and the Commission found that Romans, Abler, McKay, Peters, Lyon and Clark experienced a breakdown of interchange of freight and accompanying difficulties to varying degrees. On the other hand, neither Wilber, Tillman, Derickson, Steffy, Winter, Superior, nor Pawnee ever experienced any breakdown or interruption of freight interchange.

As a result of the activities of Local 554 and the ensuing interchange interruption experienced by a part of their number, the stockholder carriers incorporated Short Line as an interstate motor carrier. The application for a certificate of public convenience and necessity was then processed with the Commission, seeking authority for Short Line to operate as an interstate carrier of general commodities, with exceptions, over regular routes between Omaha and Lincoln, Nebraska, on the one hand, and major mid-west cities and Denver, Colorado, on the other.

The examiner found that the routes designated in the Short Line application were served by other certificated interstate carriers, including the plaintiffs. He also found that the equipment of plaintiffs and other carriers whose routes duplicated those requested by Short Line in its application, was not being operated to capacity and that such carriers could handle additional interstate traffic whenever the same was available. In addition to the large number of certificated motor carriers who serve the points along the routes designated in the Short Line application, the affected area is served by either the Chicago, Rock Island & Pacific Railroad, the Chicago & North Western Railway, the Chicago, Burlington & Quincy Railroad, the Missouri Pacific Railroad or the Union Pacific Railroad. Each of the named railroads appeared in opposition to the application, and each was, as the master found,

able and willing to handle less than car load shipments destined for a part of the Nebraska communities included within the area served by the stockholder carriers. In this connection, also, the examiner found that Burlington and Santa Fe were continuing to interchange freight normally with the stockholder carriers at Omaha and Lincoln on all interstate shipments originating at or destined for delivery to Nebraska points. Interchange was being effected by the affected stockholder carriers with National,⁵ Ringsby, Rock Island,⁶ Bos,⁷ D. M. T.,⁸ and Merchants.⁹

The examiner summarized his evidentiary findings on the latter phase of the case in the following language:

"As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with stockholders named therein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging shipments with a considerable number of line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Ablar and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D. M. T. and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder had been able to find a motor carrier willing to accept interstate shipments.

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5. National Carloading Company.
 6. Rock Island Motor Transit Co.
 7. Bos Truck Lines.
 8. Des Moines Transportation Company, Inc.
 9. Merchants Motor Freight, Inc.

"Although the shipper evidence relating to interior Nebraska points indicates that there have been some delays in transit, principally because shipments had been diverted to carriers other than those designated by the consignees, the shipments had been moving through to destination."

Again the examiner found as follows:

"On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic over their respective portions of the routes involved and the shipments are moving through to destination."

The Commission adopted the findings of the examiner, including the findings that Burlington, Santa Fe and other motor carriers were continuing normal interchange with the stockholder carriers, that the line-haul motor carriers operated over the routes proposed by Short Line and that their equipment was not used to capacity, that the line-haul carriers were enjoying the freight proposed to be handled by Short Line and that freight shipments destined to and from eastern Nebraska points were moving through to their consignment destinations.

Rather than disturbing the findings of the examiner indicative that the equipment and facilities of the certificated line-haul carriers were adequate to serve the routes sought by the Short Line application, the Commission reasoned that public convenience and necessity required allowance of the application because the breakdown of normal interchange relations with a part of the stockholder carriers constituted an abrogation by a part of the line-haul carriers of their duty to the shipping public which their certificates required. Thus, the Commission recognized that the disruption of normal interchange of freight with some of the stockholder carriers resulted from a labor dis-

pute between such stockholder carriers and Local 554. Although the Commission did not purport to decide the merits of that labor dispute, it reasoned that the certificated union carriers could not bargain away their duty to serve the public by an agreement with a labor union and thus relieve themselves of their obligations to the public as common carriers. The Commission concluded that certain of the line-haul carriers had, in reliance upon the "hot-cargo" clause of their contracts with the Teamsters Union, violated their duty as common carriers to serve the public, and that that violation had created a deficiency in motor service available to Nebraska shippers. Because of that deficiency, the Commission found that the present and future public convenience and necessity required that the Short Line application be allowed. An order was entered accordingly.

I would hold that the order be set aside for the reason that the finding of public convenience and necessity is contrary to the evidentiary findings of the Commission upon which that ultimate finding is based. Upon every application for authority to operate as a common carrier by motor vehicle between interstate points, the Commission must determine the adequacy of the facilities of existing carriers as a preface to its decision. In *Filson v. I. C. C.* [14 Federal Carriers Cases ¶ 81,316], D. C. Colo., 182 F. Supp. 675, the court said that "an inadequacy of existing facilities is a basic ingredient" for the determination of the existence of public necessity on a carrier certificate application. In *Hudson Transit Lines v. United States* [6 Federal Carriers Cases ¶ 80,503], S. D. N. Y., 82 F. Supp. 153, aff'd. 338 U. S. 802, the court held that a finding of the inadequacy of existing facilities is essential to support a finding of the Commission of public convenience and necessity for the grant of a competing carrier application. To the same effect are *Schaffer v. United States* [*supra*], D. C. N. D., 139 F. Supp. 444, rev'd on other

grounds, 355 U. S. 83; *Associated Transports, Inc. v. United States*, [13 Federal Carriers Cases ¶ 81,238], D. C. Mo., 169 F. Supp. 769; *Inland Motor Freight v. United States* [5 Federal Carriers Cases ¶ 80,244], D. C. Wash., 60 F. Supp. 520; *McLean Trucking Co. v. United States* [5 Federal Carrier Cases ¶ 80,291], D. C. N. C., 63 F. Supp. 829. In reversing the *Schaffer* case, the Supreme Court said that the relative adequacy of existing service is a significant consideration when interests of competition between carriers are being reconciled with the policy of maintaining overall sound system of transportation.

In *United States v. Detroit Navigation Co.* [5 Federal Carriers Cases ¶ 80,256], 326 U. S. 236, the court stressed the Commission's findings of inadequacy of existing facilities in reversing a decision setting aside a Commission order granting new operating rights. The application for proposed carriage by water of automobiles from Detroit, Michigan, to other Great Lakes ports was opposed by the Navigation Company which had been previously certified to serve the same ports. The Commission had found that the service by the Navigation Company had been inadequate in peak season because of a shortage of available ships, that most of the Navigation Company's ships were, at the time of the application, in the service of the United States as a result of World War II and that post-war production of cars would far exceed the pre-war volume which the Navigation Company had carried, which would, in turn, require added facilities. Those findings were stressed by the Court as support for the Commission's order certificating additional service in competition with the protestant.

In *Norfolk Southern Bus Corp. v. United States* [7 Federal Carriers Cases ¶ 80,597], D. C. Va., 96 F. Supp. 756, aff'd. 340 U. S. 802, the court did say that it was not necessary for the Commission to specifically find that existing service was inadequate before granting a certificate for

additional bus service, but that statement must be viewed against the background of the evidence in that case indicating that the service and facilities of existing carriers were inadequate.

We are not here confronted with a mere failure to find, expressly that the existing carrier facilities and service capabilities are inadequate. What we are confronted with are findings of fact adopted by the Commission which lead to only one conclusion, namely, that existing carrier facilities and service capabilities are adequate. In my opinion, the ultimate finding of public convenience and necessity for granting the Short Line operating rights is diametrically opposed to those basic findings of fact.

It is no answer to say that existing carriers do not have an absolute monopoly with respect to the routes defined in their respective certificates. Neither, in my opinion, is the fatal defect in the predicative basis of the Commission's order overcome by anything expressed in the National Transportation Policy. The Transportation Policy merely expresses congressional intent that the Commission shall have authority to maintain an integrated system of interstate transportation by balancing the competitive rights of rail, water and motor carrier facilities to fulfill the transportation needs of the public. Both the Policy and Interstate Commerce Act contemplate the granting of limited monopolies. While a carrier may not cite its certificate as a monopoly grant foreclosing the grant of competing rights, it may cite its certificate, in conjunction with evidence of its ability to render adequate service to the shipping public, as persuasive evidence against an application for competing carrier service.

Monopoly grants are tolerated to avoid ruinous competition and unnecessary duplication of service. I would hold that the monopoly rights previously granted to plaintiffs and other interstate carriers are vested rights to the extent

that those rights ought not to be ousted or diluted, except upon a finding of inadequacy of existing facilities and of a demonstrated need for competing service as an integral part of a national system of transportation.

I would declare the order under review null and void for the reason that the finding of public convenience and necessity is not supported by the Commission's basic findings of fact.

LACK OF ICC JURISDICTION TO ENTER ORDER UPON REVIEW.

The more serious aspect of this case, and an issue equally fatal, in my opinion, to the Commission's order, is the question of the jurisdiction of the Commission to enter the order under review. Upon review of the whole case I am convinced that the Commission employed the certification procedures of Section 207 of the Act, for a purpose and in a manner for which the statute was never intended. The hard core of this whole case is one fact, namely, the existence of a labor dispute between Local 554 and certain of the stockholder carriers. Any doubt as to the large effect of that fact is dispelled by reading the Commission's report. Most significant, I think, is the fact that the Commission found it necessary to devote paragraph after paragraph and several pages of its report to a discussion of the labor aspects of the case and to an explanation that it was not deciding that labor issue. In like manner, in approaching the conclusion that the order of the Commission is valid, the majority of the court devotes some 15 typewritten pages of opinion to the labor aspects of the case, to the duty of a common carrier to the public despite labor involvement and to a discussion of the lack of any decision on a labor dispute in the Commission's disposition of this case.

Moving out from the hard core of the existence of a labor dispute, the Commission concluded that plaintiff

carriers, notwithstanding their union contract and possible labor involvement, owe a duty to the public which they should not shirk. Upon that conclusion is then erected a finding that some, but not all, of the certificated interstate motor carriers breached that duty which they owed to the public by creating a disruption of normal interchange of freight and, thereby, a deficiency in motor freight service to shippers in a part of Nebraska. Upon the verdict of the guilt of a part of the interstate motor carriers hangs the finding and conclusion that public convenience and necessity requires the certification of Short Line as an additional interstate carrier to compete with plaintiffs, both the guilty and the innocent, and to compete with the rail facilities which already exist and serve the interstate needs of Nebraska shippers.

I find the suggestion that Burlington, Santa Fe, and the other interstate carriers who continued normal interchange with the stockholder carriers are not affected or injured by the order to be a completely unrealistic concept. As I have previously pointed out the Commission found that these carriers were operating at less than maximum capacity for their equipment and facilities, and that they, along with the other interstate motor carriers had been enjoying the traffic which Short Line sought by its application. The order deprives the guilty and the innocent alike of traffic which they otherwise would enjoy.

I think the evil of the order lies in a simple but very significant fact which both the Commission and the majority of this court overlook, namely, that the basic findings of the Commission's report and the evidence adduced before the hearing examiner are geared to the complaint procedures established by Section 212 of the Act, 49 U. S. C. 312, not to the procedure contemplated by the express provisions of Section 207.

The evidence adduced before the examiner tended to

prove that some, but not all, of the plaintiffs and other interstate carriers had refused to conduct normal interchange of freight destined to and from destinations within the eastern part of Nebraska. Upon that evidence the Commission rendered its verdict of guilt, making no distinction between the guilty, the semi-guilty, and the innocent. The evidence as to the effect of the disruption of normal interchange by some of the line-haul carriers tended to prove that some, but not all, of the stockholder carriers had lost business and revenue because of the decrease of interstate freight. The shipper evidence supports the finding that some shippers in the area served by the stockholder carriers had incurred increased freight charges and less efficient motor freight service as a result of disruption of normal interchange. Again, the Commission's report makes no distinction between the injured and the uninjured.

The effect of the Commission's order is a *carte blanche* decision that all interstate motor carriers operating through the interchange points used for eastern Nebraska freight are guilty, either actually or vicariously, of a breach of duty owed to the public under their operating certificates for which they would be punished by granting the Short Line application. The benefits of the granting of that application accrue not only to the stockholder carriers who were found to have been injured by the disruption of normal interchange, but, also, to the stockholder carriers who had not been injured and who, under the expressed finding of the Commission, had no complaint against the interstate carriers.

No case is cited by the Commission or by the majority of this court, and no case has been found, in which the certification procedure of Section 207 has been employed in this fashion. Cases upon which the Commission relies and which are cited by the majority of this court involved either a complaint proceeding or a civil action for injunctive

relief or for damages resulting from the failure of a carrier to render service commensurate with the obligations imposed by its status as a common carrier. *E. g.*, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, D. C. Minn., 105 F. Supp. 794, aff'd as modified, 8 Cir., 215 F. 2d 126; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* [10 Federal Carriers Cases ¶ 80,879], DC-Ore., 128 F. Supp. 475.

The Commission does have the authority under Section 212 of the Act, upon any complaint, after notice and a hearing, to compel a carrier to comply with the Act and with the duties and obligations imposed by its certificate of public convenience and necessity. *E. g.*, *Montgomery Ward & Company v. Santa Fe Trail Transportation Co.* [3 Federal Carriers Cases ¶ 30,596], 42 M. C. C. 212; *Planters Nut & Chocolate Co. v. American Transfer Company* [3 Federal Carriers Cases ¶ 30,143], 31 M. C. C. 719. Section 212 vests the Commission with a wide discretion to penalize violations of the Act and breaches of duty to the shipping public, which includes the suspension or revocation of a certificate previously granted.

The shipper or carrier injured by a violation of the Act by any carrier, or by a breach of the duties and obligations owed by a common carrier to the shipping public may prosecute an action for damages, *e. g.*, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, *supra*, *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, *supra*, or a suit to enjoin continuing unlawful conduct. *E. g.*, *Quaker City Motor Parts Co. v. Interstate Motor Freight System*, DC-Pa., 148 F. Supp. 226.

Either a complaint proceeding or a civil action for damages or injunction apparently would be appropriate in this case. As the examiner pointed out in his report, the evidence adduced in this case is geared to the com-

plaint situation, not to the customary certification proceeding under Section 207.

The distinction between a Section 212 proceeding and a civil action for relief, on the one hand, and Section 207 proceeding on the other, is too significant to lightly permit the latter to be used by a disgruntled carrier in discriminately as an equivalent substitute for the former. The Section 207 proceeding is an *ex parte*, although opponents of an application may appear and resist it. On the other hand, a Section 212 proceeding is an adversary action commenced by a complaint which must specify charges of some illegal action or breach of duty by a named carrier or carriers. As in litigation before the courts, the issues are squarely drawn. Due notice of the complaint and a full opportunity to appear and defend are the minimum requisites for a valid decision of the issues by the Commission. The initial burden of proof is on the complainant.

By contrast, the proceedings before the Commission in this case evince a serious, and I think unwarranted and unlawful, extension of the certification authority granted by Section 207. Here, an *ex parte* application was filed. Upon the hearing upon that application, by evidence adduced, both those stockholder carriers who claimed injury and those who, presumably, felt they might be injured in the future, converted the application into a broad charge of misconduct on the part of the line-haul carriers. I find that approach frightening enough when the question of adequacy of notice, alone, is considered. It becomes even more frightening when the evidence of misconduct of some of the line-haul carriers is made to attach vicariously and detrimentally to those carriers who conducted normal interchange.

While it cannot be doubted that the Commission does possess a large discretion to frame its decisions in a man-

ner calculated by it to implement the provisions of the Act, that discretion does not extend to the creation of a new penalty which is not expressly provided by the Act and which the framers of the Act never contemplated. In my opinion, that is what the Commission has done in this case, and its order should not be permitted to stand and become a very dangerous precedent.

Here, the Commission conceded that it was without authority to decide the merits of the dispute between Local 554 and a part of the stockholder carriers and to determine the validity of the "hot-cargo" clause. Yet it took the position that it could, nevertheless, find that a breach of duty had been perpetrated as a result of those labor questions by a part of the line-haul carriers serving eastern Nebraska, and, upon that finding, penalize all carriers in that classification by the grant of competing operating rights to Short Line. That is, I think, the crux of the true impact of the labor aspects on this case—they furnished an opportunity for the Commission to assert an authority beyond that granted by the Act.

The old axiom that "the hit dog howls" should be made to apply to this case. If Clark and others have a complaint against some or all of the line-haul carriers, they alone should do the howling. Section 212 of the Act provides them the opportunity to assert that complaint before the Commission and invoke a jurisdiction under which the issues could be decided in an appropriate proceeding. At least, until the complaint procedure has been tested, we should not permit the whole pack to come in asserting that some have been hit and claiming a right, on behalf of the pack, to a remedy which the Act was never intended to provide.

I would declare the Commission's order null and void.

APPENDIX B.

INTERSTATE COMMERCE COMMISSION.

No. MC—116067¹.

Nebraska Short Line Carriers, Inc.,

Common Carrier Application.

Decided June 1, 1959.

79 M. C. C. 599.

REPORT OF THE COMMISSION ON ORAL ARGUMENT.

BY THE COMMISSION:

These proceedings involve related issues and will be disposed of in a single report. They were heard on separate records and each was the subject of a separate recommended order of the examiner to which it was referred. Exceptions were filed by applicant to the recommended order of the examiner in the title proceeding, and a number of rail and motor carriers operating in the affected territory replied. No exceptions were filed to the recommended order of the examiner in No. MC-116067 (Sub-No. 2) proceeding, but it was stayed by us and applicant was thereafter permitted to file a brief, to which a number of rail and motor carriers replied. Oral argument has been held. Our conclusions differ from those recommended in the title proceeding.

By application filed June 22, 1956, as amended, in the title proceeding, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign

¹ 1. This report also embraces No. MC-116067 (Sub-No. 2), Nebraska Short Line Carriers, Inc., Extension—32 States (formerly entitled Nebraska Short Line Carriers, Inc., Common Carrier Application). The title has been changed to avoid confusion.

commerce, as a common carrier by motor vehicle of general commodities, with exceptions, between the points, over the regular routes, and in the manner described in appendix A hereto.

By application filed January 10, 1957, as amended, in No. MC-116067 (Sub-No. 2), hereinafter called the Sub-2 application or proceeding, the same applicant seeks authority to transport the same commodities as in the title proceeding, over irregular routes, between Omaha, Nebr., on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Both applications are opposed by a large number of rail and motor carriers as hereinafter described.

Applicant is a Nebraska corporation, initially organized June 14, 1956. It has an authorized capitalization of \$600,000, comprised of \$500,000 in preferred stock and \$100,000 in common stock. At the time of the hearings herein, 1 share of preferred stock had been issued, and there had been issued and paid for in cash \$37,500 in common stock. All but one-half share of the outstanding common stock is held, in varying amounts, by the following named motor carriers. The remaining one-half share is owned by one Harvey Tillman, who manages Tillman Transfer Company, which is owned by his wife, Helen L. Tillman. The stockholder-carriers are John Jack Romans, doing business as Romans Motor Freight; Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer; Royal F. Lyon, doing business as Lyon Transfer; C. C. McKay and Earl R. McKay, doing business as McKay Freight Line; Waldo W. Winter and Hubert B. Winter,

doing business as Winter Bros.; Abler Transfer, Inc.; Herbert Peters, doing business as Fremont Express Co.; Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer; John Derickson, doing business as Derickson Transfer; Louis Steffensmeir and Edward Steffensmeir, doing business as Steffy's Transfer; and Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, all of which will hereinafter be referred to collectively as the stockholders-carriers, or individually by the names under which they are doing business. As of April 4, 1957, John Jack Romans was President of the corporation, C. C. McKay was Vice President, Walter F. Clark was Secretary, and Royal F. Lyon was Treasurer, and such persons, together with Leonard Abler, of Abler Transfer Inc., were the directors of the corporation. Certain of these stockholder-carriers have heretofore conducted operations in interstate commerce, to the same extent as authorized in their Nebraska intrastate certificates, under the second proviso of section 206(a) of the Interstate Commerce Act, but they have since been granted certificates by this Commission. All are carriers of general freight operating over regular routes in eastern and central Nebraska converging upon Omaha, Lincoln, and Grand Island, Nebr., at which points they interchange traffic with other motor carriers for movement to and from points beyond Nebraska.

Applicant corporation owns no motor vehicles. It is contemplated that all vehicles initially required for the proposed operations will be leased from the stockholder-carriers or other carriers. As of January 26, 1957, applicant has assets totalling \$32,785, liabilities of \$467 and a net worth of \$32,318. As of March 31, 1957, the net worth of the corporation had decreased to \$25,825. It was granted temporary authority on December 4, 1956, for transportation as a motor common carrier of general commodities,

with exceptions, between Omaha and Chicago, serving no intermediate points, and between Omaha and St. Louis, serving the intermediate point of Kansas City except on shipments moving to or from St. Louis. As of the date of the hearing in the Sub-2 proceeding, it was operating one round trip schedule daily between Omaha and Chicago and between Omaha and Kansas City, with additional trips as needed. Operations to and from St. Louis were on a call-and-demand basis and were confined to truckload shipments pending completion of arrangements for facilities at St. Louis to handle less-than-truckload traffic. Terminal facilities were being leased at Omaha, Chicago, and Kansas City. All equipment operated was leased.

Applicant corporation was conceived and organized by the stockholder-carriers as a means of combatting a labor situation arising in the Spring of 1956, which threatened to deprive them of much of the interstate traffic which they had theretofore been handling, and, in fact, to drive them out of business entirely. For several years, the stockholder-carriers have resisted all attempts on the part of the Teamsters Union² to organize their employees. Notwithstanding the almost complete lack of any inclination on the part of the employees for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top", that is, that organizational efforts should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a closed-shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. This was accomplished by declaring certain of the stockholder-carriers "unfair" and the institution of a secondary

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

boycott against their traffic on the part of the larger unionized carriers with which the stockholder-carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to certain so-called "protection of rights" or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with a Union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exists.

Commencing in the early part of May, 1956, certain of the stockholder-carriers began to experience difficulty in effecting normal interchange arrangements with the larger line-haul carriers with which they had theretofore done business. This difficulty was experienced primarily at Omaha, but also to some extent at Lincoln and Grand Island, and consisted of the refusal on the part of many of the larger carriers to accept outbound interline traffic tendered to them by the stockholder-carriers, and the refusal to turn over to the latter inbound traffic either routed over the latter's lines or which normally would have been turned over to them at Omaha and the other points named for ultimate delivery to interior Nebraska points served by them. None of the stockholder-carriers, except Clark Bros. Transfer, has ever had any dispute with its employees, and no picket lines had been established except around the Omaha terminal of Clark Bros. A picket line was established at the Clark Bros. Omaha terminal some time in Sep-

tember 1955, and all interline deliveries to the terminal ceased at that time. Four of Clark Bros.' seven employees at the Omaha terminal appear to have gone on strike initially. Clark filed charges with the National Labor Relations Board against the Union for unfair labor practices and the history of that matter is adequately described in the examiner's report.

In addition to the interline difficulties experienced by the stockholder-carriers described above, certain Omaha shippers have experienced labor difficulties resulting in the establishment of picket lines around their establishments, and the resultant refusal on the part of the organized carriers to provide pickup and delivery service thereat. If the instant applications are granted, applicant proposes to offer free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring its services, regardless of picket lines.

At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previ-

ously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha.

The Title Proceeding. As heretofore indicated, this application involves a proposed regular-route operation extending between Omaha, on the one hand, and, on the other, such points as Denver, Colo., Chicago, Minneapolis, Minn., and St. Louis, including service at intermediate points except in the case of a proposed alternate route between Omaha and Chicago.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through

peaceful union picket lines amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

In their replies to the exceptions, the opposing carriers and the Union³ argue generally that the conclusions of the examiner are in accordance with the law and the facts and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the

3. Separate replies were filed by Local 554 of the Teamsters Union, Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, and opposing rail carriers; and joint replies were filed (1) by Watson Bros. Transportation Co., Inc., Union Freightways, Red Ball Transfer Company, Navajo Freight Lines, Inc., Independent Truckers, Inc., Prucka Transportation Inc., H. & W. Motor Express Co., and Denver-Chicago Trucking Company, Inc., and (2) by Illinois-California Express, Inc., Interstate Motor Lines, Inc., Ringsby Truck Lines, Inc., and Pacific Intermountain Express Co.

additional motor carrier service proposed and that it is fit and able properly to conduct an operation of the scope involved.

There is no serious dispute as to the facts.⁴ An examination of the record establishes that the pertinent facts are accurately and adequately stated in the report which accompanied the examiner's recommended order, and we shall adopt such statement as our own, confining our discussion herein to the issues presented by the exceptions and replies thereto.

In addition to the stockholder-carriers, the title application is supported by a large number of persons operating businesses in Nebraska who have occasion to ship or receive merchandise to or from points beyond the State and who, in many instances, are dependent upon the regularly scheduled service of the stockholder-carriers to meet their normal everyday transportation requirements. These persons represent business houses of various types at such points as Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. As a result of the breakdown of interchange arrangements at Omaha, shippers at interior Nebraska points have experienced delays in the movement of their outbound shipments to destination, and consignees at such points have experienced delays, inconveniences, and unforeseen expense in connection with their inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most logical manner, namely, over the lines of the stockholder-carriers providing daily scheduled service to their communities. When motor shipments are

4. Reference in the examiner's report to the fact that Clark Bros. Transfer had seven employees on September 14, 1955 is intended to refer to employees at the Omaha terminal only.

diverted to rail, the consignees suffer not only delays in delivery but also the additional expense of having to pay a combination of rail and motor local rates since there are no joint motor-rail rates published on such traffic through Omaha.

The difficulties of the Omaha shippers supporting the application are of a somewhat different nature. These firms, as a result of disputes with various labor organizations, have had picket lines established around their premises, and the refusal of the organized carriers to cross such picket lines has resulted in the almost complete withdrawal of motor service to their establishments. Of the three firms in this category, two have succeeded in resolving their labor disputes, at least to the extent of having the pickets withdrawn, and they were experiencing no difficulty at the time of the close of the hearings herein. The remaining firm, which operates a storage and distribution business in Omaha, with two warehouses at that point and one at Council Bluffs, Iowa, has had a Teamsters' picket line around the Omaha warehouses since May 24, 1956, and has been virtually without motor service because of the refusal of the unionized carriers to cross the picket lines. It has suffered a substantial loss of business as a result of its inability to obtain motor service for inbound deliveries and outbound distribution shipments. There is no evidence of violence or impending violence in connection with the picketing of any of these firms, and the refusal of the organized carriers to provide or attempt to provide pickup and delivery service appears to have resulted from their adherence to their "hot cargo" agreements, without regard to their obligations as common carriers.

The evidence concerning inadequate service, or lack of service, experienced by the supporting shippers is confined to shipments moving to or from points in eastern Nebraska, and there is no indication whatever of a need or professed

need for additional facilities for the movement of traffic between many of the points embraced in the application. Similarly, the service failures attributable to the breakdown of interchange arrangements appears to have occurred primarily and preponderantly as a result of the breakdown of interchange arrangements at Omaha, which is the gateway through which most of the eastern Nebraska traffic flows. As to origins and destinations beyond Nebraska, the evidence is concerned primarily with traffic moving to and from Des Moines, Minneapolis, Chicago, St. Louis, and Kansas City. There is no evidence of any substantial need for service to and from Denver or St. Joseph, Mo., which points were mentioned by a few of the supporting shippers. The application contains no practicable routing for the movement of freight between Omaha and Des Moines, and there is no satisfactory explanation as to why traffic moving between eastern Nebraska points and Minneapolis could not be routed through the Sioux City, Iowa, gateway, and thus bypass the Omaha interchange. Considering all of the evidence presented, therefore, it would appear to establish a need for additional motor service within the scope of the instant application between Omaha, on the one hand, and, on the other, Chicago, St. Louis, and Kansas City, restricted to traffic originating at or destined to points in Nebraska.

Evidence in opposition to the application was submitted on behalf of Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Denver-Chicago Trucking Company, Inc., Union Freightways, Illinois-California Express, Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Red Ball Transfer Company, Ringsby Truck Lines, Inc., Watson Bros. Transportation Co., Inc., and a number of rail carriers. All of the named motor carriers, except Pacific Intermountain Express and Denver-Chicago,

serve Omaha. Of those serving Omaha, Burlington Truck, Union Freightways, Illinois-California, Independent Truckers, Interstate, Navajo, Red Ball, Ringsby, and Watson Bros. operate between Omaha and Chicago. Five of the above named carriers, Red Ball, Watson Bros., Union Freightways, Burlington Truck, and Santa Fe Trail, operate between Omaha and Kansas City; Watson Bros., Union Freightways, and Burlington Truck operate between Omaha and St. Louis; Watson Bros. and Union Freightways operate between Omaha and Minneapolis; and Watson operates between Omaha and Des Moines. All of the opposing railroads serve Omaha, and, either directly or through their connections, serve all principal points on the routes involved in the instant application.

The Sub-2 Application. By this application, applicant seeks authority to transport general freight between Omaha and all points in 32 States. As in the title proceeding, the application is based upon an alleged inadequacy of existing motor service by reason of the refusal of most of the organized carriers serving Omaha to interchange traffic with the stockholder-carriers and their refusal to provide pickup and delivery service at the establishments of certain Omaha firms at which union picket lines have been established.

The examiner found that applicant had failed to establish that public convenience and necessity require the operation for which authority is sought, and recommended that the application be denied. As heretofore indicated, no exceptions were filed to the recommended order, but applicant was permitted to file a brief after the service of the order and the opposing carriers replied thereto. In its brief, applicant argues that it has met its burden of proving a need on the part of the public for the service proposed; that the granting of the authority sought is necessary in order to insure adequate transportation fa-

cilities to a substantial portion of the shipping public of Nebraska; that it is fit, willing, and able properly to provide the service shown to be required; and that it is the primary duty of the Commission to develop a national transportation system adequate to meet the needs of the commerce of all parts of the country. In their replies, the opposing carriers urge that applicant has failed to establish a need for any substantial portion of the service proposed; that it has failed to provide any convincing evidence that it is able, financially and otherwise, to conduct an operation of the scope suggested; that existing rail and motor services have not been shown to be inadequate; that any inadequacies experienced by the supporting shippers are attributable to labor difficulties over which this Commission has no jurisdiction; that any grievances which the stockholder-carriers or the shipping public may have against existing carriers should be made the subject of a complaint proceeding rather than an application for additional operating rights such as here involved; and that the authority of the Commission to grant new operating authority should not be used to circumvent labor disputes or cure temporary service deficiencies resulting therefrom.

The pertinent facts of record are adequately stated in the report which accompanied the examiner's recommended order and we adopt such statement, as hereinafter augmented or modified, as our own.

In spite of the broad territorial scope of the application, and the voluminous testimony adduced from the stockholder-carriers concerning their inability to effect normal interchange arrangements with a number of the organized carriers serving Omaha, very little evidence was submitted in this proceeding on behalf of persons or firms having occasion to make shipments through the Omaha gateway. Representatives of only six shippers appeared in support of the application. Of these, the Omaha Parlor

Frame Company,⁵ which is engaged in the manufacture of wooden furniture at Omaha, was experiencing no transportation difficulties at the time of the hearing herein, and testimony submitted in its behalf as to a need for additional motor service need not further be considered. The Broyhill Company manufactures farm equipment at its plant at Dakota City, Nebr., which is about 6 miles south of Sioux City, Iowa. During 1956 and the first quarter of 1957, it made shipments of its products to scattered points in 30 of the States embraced in the instant application and received inbound shipments of raw materials from scattered points in 17 of the States involved. There is no indication as to the frequency of the shipments referred to, the volume moved to any particular point, whether the traffic moved by rail or motor vehicle, whether, if by truck, it moved in truckload or less-than-truckload quantities, or how much moved through the Omaha gateway. On or about March 15, 1957, a number of its employees went on strike and a picket line was established around its Dakota City plant. As a result, the carriers formerly serving its plant, except stockholder Abler Transfer, discontinued providing pickup and delivery service at the plant. It supports the instant application in order that it may route inbound and outbound shipments via Abler Transfer through Omaha, at which point the shipments would be interchanged with applicant.

Two firms at Ord, Nebr., support the application. One is a dealer in farm implements and has occasion to receive shipments of implements and parts from Hopkins, Minn., Chicago and Rock Island, Ill., and Kansas City. The other sells and constructs steel farm buildings and receives most of its materials from Detroit, Mich. Their inbound ship-

5. Omaha Parlor Frame Company and the Chardon Company are affiliated firms occupying the same premises at Omaha. No attempt was made to distinguish between the separate requirements of the affiliates and we shall consider them as a single firm.

ments move predominantly through Omaha and they specify Romans Motor Freight as the delivering carrier out of Omaha because Romans provides a daily service between Omaha and Ord. Their routing instructions are frequently ignored and they have experienced numerous delays in delivery as a result of the traffic having been turned over for ultimate delivery to rail carriers or motor carriers serving Ord only on an irregular nonscheduled basis. Shipments diverted to rail involve added expense to the consignees because they are required to pay the difference between the all-motor joint rates under which the shipments were dispatched and the combination local motor and rail rates through Omaha or other points. A majority of the consignments to these two firms are in less-than-truck-load quantities.

Wheeler Lumber, Bridge & Supply Company supplies bridge construction materials and pole line materials to contractors. It has a warehouse at Norfolk and has occasion to ship or receive supplies from or to that point. The majority of its supplies, consisting of lumber and poles, originate on the west coast and move into Norfolk by rail. It does, however, receive some materials from such points as Minneapolis and Duluth, Minn., Chicago and Peoria, Ill., St. Louis, Kansas City, and Pittsburgh, Pa., and about 75 percent of such traffic moves by truck. It has received alternate service from Clark Bros., and Abler Transfer in respect of traffic moving through the Omaha gateway and regularly specifies delivery by such carriers from Omaha. Such routing instructions are not always followed, however, and it frequently has experienced unwarranted delays in the delivery of its materials at Norfolk. It admittedly has single-line service from Minneapolis to Norfolk through the Sioux City gateway, and no difficulty appears to have been encountered on traffic moving in that manner. The company also has occasion

to make outbound shipments from its Norfolk warehouse to points in Iowa, and to some extent to points in Kansas, Minnesota, South Dakota, and Wyoming. If the instant application is granted it might ship to points in such States through the Omaha gateway, although admittedly the routing through Omaha would be circuitous to points north and west of Norfolk. As to the inbound shipments, there is no indication as to the volume received from any particular point, the frequency of service which might be required, or the percentage of shipments which might move in truckload or less-than-truckload quantities. As to the outbound traffic, there is no indication as to the points at which it desires service, the volume of traffic which might be expected to move into such States, the frequency of service which might be required, the nature of the shipments as to whether truckload or less-than-truckload, or the routings heretofore utilized. Further, the shipper appears to have made little or no investigation as to the service available to it other than that in connection with Clark Bros., and Abler Transfer through the Omaha gateway.

The remaining shipper submitting evidence in support of the application is Ford Storage and Moving Company. This firm operates two general warehouses at Omaha, and one at Council Bluffs, and has occasion to receive shipments of merchandise from out-of-state points and to make distribution of merchandise to points in the surrounding States. A Teamsters' picket line was established at its Omaha warehouses on or about May 24, 1956, and was still in existence at the time of the hearing herein. As a result, practically all inbound motor deliveries were discontinued and all attempts to obtain outbound service from the warehouses by unionized motor carriers theretofore utilized have been unsuccessful. Suppliers have been requested to make all inbound shipments by rail and they appear to have been generally agreeable. The inability to

obtain outbound service from the unionized carriers is said to have resulted in the loss of certain substantial accounts, and it is feared that additional business losses will result from the company's inability to obtain motor service, both inbound and outbound, to the extent that such service was available prior to the time the picket lines were established.

The record is vague and confusing as to the exact nature and scope of the motor service which might be required. During 1956, prior to the establishment of the picket lines, the company received inbound motor shipments, in substantial quantity, from Chicago, St. Louis, Kansas City, Louisville, Ky., Durham and Winston-Salem, N. C., Cincinnati, Ohio, Beloit, Wis., and Sioux Falls, S. Dak., and in smaller quantity from Bloomington, Ill., Duluth and Minneapolis, Minn., Buffalo, N. Y., Toledo, Ohio, and Houston, Tex. All of this traffic, however, with the exception of that originating at the two Minnesota points, appears to have either originated or been interchanged at Chicago, St. Louis, or Kansas City. Only 23,000 pounds originated at Duluth, and only 4,000 pounds at Minneapolis, and there is no indication as to the routing. There is no information whatever concerning the nature and extent of the outbound motor shipments made during that period, or thereafter, except the mere statement that outbound traffic moves to points in Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado, and that some is transported by rail and some by motor vehicle.

Obviously, the evidence submitted on behalf of the supporting shippers falls far short of establishing any substantial need on the part of the shipping public for additional motor service to the extent proposed, or, in fact, to any extent exceeding that for which a need is shown in the title proceeding and duplicative thereof. We cannot con-

sistently grant authority for the institution of a new service without a clear indication that the service sought to be established is needed by the shipping public and will be utilized in the event the authority sought is granted. We cannot make the necessary findings concerning a need for additional service unless we are furnished precise information in connection therewith. The fact that the stockholder-carriers have experienced difficulty in effecting interchange arrangements at Omaha and the fact that a few Omaha shippers have experienced difficulty in obtaining pickup and delivery service at their places of business does not establish a need for additional single-line service between Omaha and all points in 32 States.

In addition to the paucity of evidence concerning the existence of any substantial need on the part of the public for the service proposed, there is no convincing evidence that applicant has the resources or the experience to conduct such an extensive operation. No plan is advanced and none is apparent for handling less-than-truckload traffic over such a wide area and a considerable portion of the traffic here involved falls within that category. Even in connection with the movement of truckload traffic there is serious doubt as to whether applicant would be able to obtain return loads with sufficient frequency to effect a feasible and profitable overall operation.

We conclude that applicant has failed to establish a need on the part of the public for any part of the service proposed in the Sub-2 proceeding with the possible exception of that between Omaha and such points as Chicago, St. Louis, and Kansas City, which service would duplicate that for which authority is sought in the title proceeding, and that the Sub-2 application should be denied. In the circumstances, there is no need to discuss the voluminous evidence submitted on behalf of the opposing rail and motor carrier operating in the affected territory.

Further Discussion and Conclusions. We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding-out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations.

The breakdown in interchange arrangements at Omaha between the unionized carriers and the stockholder-carriers and the refusal of the unionized carriers to provide pickup and delivery service at establishments where picket lines have been established has resulted in a substantial disruption in motor service to a large portion of the Nebraska shipping public, and the responsibility for the service deficiencies shown to exist must be laid at the doors of the unionized carriers which preempted their obligations to the Union to their obligations to the public. We do not hold

that all instances of refusal to provide service are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers. The apprehensions of certain of the organized carriers that any opposition to the demands of the Union would have resulted in reprisals against them appears greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc. changed its policy against interchange with "unfair" carriers before the close of the hearings herein without experiencing any difficulty. The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by the mere acquiescence in the boycott, the unionized carriers lose the protection which section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby. See *Carpenters' Union v. Labor Board*, 357 U. S. 93.

In a situation such as that here presented, there arises a

question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely the filing of the instant applications under the provisions of section 207 of the act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen.

One other matter requires consideration. As seen, the stockholders of the applicant corporation are carriers in their own right and jointly control applicant through stock ownership. Section 5 of the act provides that it shall be lawful with the approval and authorization of the Commission for any carrier, or two or more carriers jointly, to acquire control of another carrier through ownership of its stock. No application for such approval and authorization has been filed in connection with the acquisition by the stockholder-carriers of control of applicant, and any grant of authority found warranted herein will be conditioned upon the filing of such an application and the obtaining of our approval for the control now exercised.

At this point it may be well to note that the situation here presented differs from that considered in *Galveston*

Truck Line Corporation Extension—Oklahoma, M. C. C., decided concurrently herewith, in that the labor difficulties upon which the cited proceeding was based had, with one minor exception, ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term "present or future public convenience and necessity" in section 207 of the act, under which the applications were filed.

We find, in No. MC-116067, that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Nebr., and Chicago, Ill., (a) from Omaha over Alternate U. S. Highway 30 to junction U. S. Highway 30 at or near Missouri Valley, Iowa, thence over U. S. Highway 30 to junction Illinois Highway 65 at or near Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, thence over U. S. Highway 34 to Chicago, and return over the same route, and (b) from Omaha over U. S. Highway 6 to junction U. S. Highway 66 near Joliet, Ill., thence over U. S. Highway 66 to Chicago, and return over the same route, and (2) between Omaha and St. Louis, Mo., from Omaha over U. S. Highway 275 to junction U. S. Highway 34 at or near Glenwood, Iowa, thence over U. S. Highway 34 to Kansas City, Mo., thence over U. S. Highway 40 to St. Louis, and return over the same route, serving no intermediate points on routes (1)(a) and (1)(b), and serving the intermediate point of Kansas City on route (2), restricted, in each instance, to traffic originating at or

destined to points in Nebraska; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, subject to the condition that the stockholder-carriers controlling applicant shall first obtain our approval of such control under the provisions of section 5 of the Interstate Commerce Act; and that in all other respects the application should be denied.

We further find, in No. MC-116067 (Sub-No. 2), that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, and upon obtaining our approval of the acquisition by its stockholders of control of the corporation, an appropriate certificate will be issued. An order will be entered denying No. MC-116067 except to the extent granted herein, and denying No. MC-116067 (Sub-No. 2) in its entirety.

COMMISSIONERS MURPHY, WALRATH, GOFF, and WEBB did not participate.

No. MC-116067

Appendix A (to Commission's Decision).

Nebraska Short Line Carriers, Inc.

DESCRIPTION OF AUTHORITY SOUGHT.

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30, to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph,

Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of June, A. D. 1959:

No. MC-116067.

Nebraska Short Line Carriers, Inc., Common Carrier Application.

No. MC-116067 (Sub-No. 2).

Nebraska Short Line Carriers, Inc., Extension—32 States.

Investigation of the matters and things involved in these proceedings having been made, and said Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application in No. MC-116067, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That said application in No. MC-116067 (Sub-No. 2), be, and it is hereby denied.

By the Commission.

Harold D. McCoy,

(Seal)

Secretary.

APPENDIX C.

No. MC-116067.

Nebraska Short Line Carriers, Inc.
Common Carrier Application.

REPORT AND ORDER.

RECOMMENDED BY DONALD R. SUTHERLAND, EXAMINER.

By application filed June 22, 1956, as amended, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from and to the points, over the routes and in the manner set forth in appendix A hereto. Certain carriers¹ and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, hereafter called Teamster, oppose the application.

1. Bruce Motor Freight, Inc., Brady Motorfrate, Inc., Burlington Truck Lines, Inc., Churchill Truck Lines, Inc., Denver-Chicago Trucking Company, Inc., H. & W. Motor Express Company, Illinois-California Express Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Inter-mountain Express Co., Prucka Transportation, Inc., Red Ball Transfer Co., Ringsby Truck Lines, Inc., Rock Island Motor Transit Co., Santa Fe Trail Transportation Co., Union Transfer Company, doing business as Union Freightways, Watson Bros. Transportation Co., Inc., herein called Bruce, Brady, Burlington, Churchill, D. C. T., H. & W., I. C. X., Independent, Interstate Motor, Navajo, P. I. E., Prucka, Red Ball, Ringsby, Rock Island Motor, Santa Fe Trail, Freightways, and Watson, respectively. The application is opposed also by class 1 rail carriers in western trunkline territory.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on certain days in January and February, 1957, at Lincoln. Briefs have been filed.

Applicant, a corporation organized initially on June 14, 1956, is authorized to issue 1,000 shares of common and 5,000 shares of preferred stock at \$100 per share.² At the time of hearing \$37,550 of common stock had been issued. This was held in varying amounts by the following short-line nonunion motor carriers operating between certain points in Nebraska: John Jack Romans, doing business as Romans Motor Freight, Fred L. and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, partners, doing business as McKay Freight Line, Waldo W. and Hubert B. Winter, doing business as Winter Bros., Abler Transfer, Inc., Herbert Peters, doing business as Fremont Express Co., Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Louis Steffensmeir, and Edward Steffensmeir, doing business as Steffy's Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, hereafter called, Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Frear, Derickson, Steffy, and Wilber, respectively, and Harvey Tillman of Tillman Transfer Company. Romans is President, C. C. McKay is Vice President, Walter F. Clark, Secretary, and Lyon is Treasurer. These same persons, along with Leonard Abler, are the directors. Some of the stockholders hold certificate from this Com-

2. When the organization was initially incorporated the shares of common stock had a par value of \$50 each, and the preferred was \$100 per share. Subsequently, after the incorporation papers were amended, the common stock was reissued in the amount of \$100 per share to comply with Nebraska laws. Each \$50 payment which had been made on stock constitutes a half share.

mission, and others have authority from the Nebraska State Railway Commission which they have registered with the Interstate Commerce Commission under the second proviso of section 206(a) of the act. As here material, most of them are authorized to transport general commodities, with exceptions, between certain points in eastern and central Nebraska, including Omaha and Lincoln. One carrier, Derickson, operates between Grand Island and North Platte. Collectively, they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration.

Applicant's traffic manager has investigated the availability of terminal facilities at certain points and has been assured that necessary space is obtainable at Chicago, St. Louis, Kansas City, Minneapolis, and Denver. No investigation was made with respect to Des Moines. He has also found upon investigation that drivers and plenty of motor vehicles can be leased for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease some equipment from its stockholders or other motor carriers. No definite schedules have been set up regarding the proposed operations, and the frequency of such schedules would depend to some extent on the availability of traffic. Although the traffic manager indicates that one driver would be used on each vehicle at the beginning of operations, relay points would be established if necessary. It is estimated that the running time from Omaha to Chicago would approximate 18 hours. If the authority sought is granted, applicant proposes to hold such service out to the public generally. Its general manager indicated that no discrimination would be shown in selecting carriers for interchanging traffic. As of January 26, 1957, applicant had total assets of \$32,785; liabilities of \$467, and net worth of \$32,318.

By order of December 4, 1956, in No. MC-116067 (Sub-

No. 1) TA, the issuance of temporary authority to applicant was approved for 180 days upon compliance with certain requirements, which were met January 3, 1957. Joint petitions for reconsideration filed by Watson, Freightways, Red Ball, and Prucka, to the temporary authority order were denied by the Commission on February 25, 1957. The temporary authority is set forth in appendix B hereto. Temporary authority is granted under section 210a of the act, and such a grant creates no presumption that corresponding permanent authority will be granted thereafter. In No. MC-116067 (Sub-No. 2) applicant has applied for certain permanent irregular-route authority for the transportation of general commodities, with exceptions, between Omaha, on the one hand, and, on the other points in certain States. A hearing has been held on that application and the matter is still pending.

In or about May, 1956, the stockholders began to experience difficulty at Omaha, Lincoln, and Grand Island, Nebraska in respect of interstate traffic normally interchanged at those points with certain connecting motor carriers. For example, Romans was informed in Omaha by an official of Independent that the latter carrier was risking labor difficulties with its employees, who are members of Teamsters, if normal interchange of shipments between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956 were not accepted by that carrier. These shipments, which were not tendered to any railroad, were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it does not do so in every instance. Furthermore, Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grant Island, particularly with Red Ball and Watson. Time is

consumed in finding motor carriers willing to accept traffic, and Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made periodically to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Romans has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight in 1956 decreased somewhat compared to the 1955 volume. His gross revenue in 1956 was \$159,280 and \$138,775 in 1955. Prior to May 1956, 30 percent of his traffic consisted of outbound shipments from the area he serves, and 70 percent was inbound. Presently, most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, Red Ball, Ringsby, Santa Fe Trail, and Watson; also with Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl's Express, Inc., Ideal Truck line, Iowa-Nebraska Transportation Co., Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company and Wright Motor Freight Lines, hereafter called B-C Cartage D. M. T.,

Haeckl, Ideal T. N. T., McMakin, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson, and Wright, respectively. These were most of the major motor carriers with whom interchange was effected. After the approximate date of May 7, 1956, they would not tender or accept freight from Romans at certain times, and this has continued. However, as previously shown, Burlington, Santa Fe Trail, and Rock Island have continued interchange with Romans, and Ringsby also has accepted freight. Romans has not been requested by his employees to obtain a union contract. He does not think any of them are members of a union. There have been no strikes by his employees, and no pickets have been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk and it serves Sioux City, Iowa, as well as Omaha. However, no terminal facilities have been operated by this carrier at Sioux City since about March 15, 1956, when certain unionized connecting motor lines serving that point discontinued normal interchange operations with Abler. Shortly thereafter, a similar discontinuance of normal interchange began at Omaha by most of the carriers with whom Abler interlined freight. Burlington and Santa Fe Trail continued to interchange traffic, and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Sturm. In June 1955, at both Sioux City and Omaha, Abler interchanged 400 shipments with Watson, and in June 1956, none were interchanged. In June 1955, at the same two points it received from 300 to 500 shipments from Freightways, and in June 1956, it interchanged about five shipments with that carrier. In the first nine months of 1956, Abler's gross revenue, including interstate and intrastate traffic was about \$70,000 less than that for the corresponding period of 1955. Abler was approached by union representatives, beginning in August 1955, relative to signing a contract.

He was advised by one union representative that a drive was on for memberships in Nebraska, and the nonunion motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebr. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of Omaha and Lincoln. On or about April 17, 1956, a large number of motor carriers discontinued normal interchange with McKay at Omaha and Lincoln. At Omaha and Lincoln in 1955, McKay received 1,215 interstate shipments by interline from other motor carriers, and in 1956 it received only 210. Gross revenue in 1955 amounted to \$205,000, and \$156,000 in 1956. On some occasions McKay's driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April 17, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with McKay.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals about \$60,000 and approximately 40 percent of this amount is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa, and Crete, Nebr.

Tillman operates between Fremont and Lincoln. In 1956 this carrier grossed about \$47,000. About 10 percent of this was derived from transporting interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball, and McKay.

Peters operates daily between Omaha and Fremont and transports some interstate traffic between these points.

At the time of hearing, Peters was still interchanging traffic with Prucka, Burlington, and I. N. T. He still interchanges freight now and then with certain other motor carriers, but not as frequently as formerly. Merchants, for example, before April 1956, gave Peters a substantial amount of traffic, but after that time very little. Also, certain traffic which Peters had received from Independent was given to Joe Roy Freight Line, hereafter called Roy. Most of Peters' present interchange traffic consists of shipments received in Omaha from National Carloading Company for delivery to Fremont. He grossed about \$20,800 in 1956 which compares favorably with other years, and about 85 percent of this revenue was derived from interstate business.

Derickson operates daily over U. S. Highway 30 between Grand Island and North Platte and interlines traffic at those points with various motor carriers without any apparent difficulties. Derickson serves numerous consignees who route their traffic for ultimate delivery over his line. Derickson has a number of competitors between Grand Island and North Platte, and considers the service he renders between these points as adequate.

Steffy operates over routes between Omaha and Creston, Nebr., and between Dodge, Nebr., and Sioux City. Some of Steffy's authorized points on and near Nebraska Highway 91, east of Creston, are not known to be served by any other motor carrier on a regular basis. It interchanges interstate traffic with various motor carriers at Omaha. Its profit in 1955 amounted to about \$6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh, and Central City. He serves about 30 Nebraska points regularly, and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha

and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters (Local No. 554) to sign a contract. Lyon inquired whether the union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the union to induce Lyon to sign a contract and when these attempts failed normal interchange ceased at Omaha on or about March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a regular basis, viz., Bos Truck Lines, Inc., hereafter called Bos, Burlington, Ringsby, D. M. T., and National-Carloading. Also, at the time of hearing he was interchanging with Merchants on Minneapolis St. Paul traffic. D. M. T., and Prucka tendered some freight to Lyon during the last week of January, 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments; however, there have been instances when Lyon has not been given freight by these carriers which was routed over his line. The authority sought by applicant between Central City and Omaha duplicates Lyon's and Romans' operating rights between these points, and Lyon does not believe there is any need for additional service on that portion of the route between Omaha and Central City. There have been no strikes or labor disputes on Lyon's line, and no pickets at his places of business.

Winter operates between Omaha and Lincoln. The amount of interstate traffic transported by this carrier between these points is small. Winter's representative

believes more interstate traffic would be obtained if the application herein is granted.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln; Lincoln to Beatrice; and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings; Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route. The operations, however, can be connected by the use of certain described irregular route authority.

Clark operates over regular routes between Omaha, Lincoln, and south Sioux City, on the one hand, and, on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove, and Madison. It serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its interstate traffic at Omaha, and some at Lincoln. About 90 percent of its traffic is transported between Omaha at Norfolk. In 1955 Clark grossed \$286,346, 40 percent from interstate and 60 percent from intrastate traffic. In 1956 gross revenue was \$217,412, 4 percent from interstate and 96 from intrastate. Prior to September 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955 representatives of Teamsters (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955 a picket line was placed at Clark's Omaha terminal. Thereafter, deliveries of interchange traffic to

Clark's terminal at Omaha ceased generally. Clark did, where possible, deliver outbound interchange shipments to connecting carriers. On or about October 1, 1955 Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board, hereafter called NLRB. This action culminated in a signing of a settlement agreement on December 7, 1955 by representatives of Local No. 554, Fred L. Clark, and a representative of NLRB. The agreement was approved December 8, 1955 by the Regional Director of NLRB. Among other things, the agreement provided for the posting of a notice at the business office of Local No. 554 in Omaha. The notice in effect stated that the union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D. M. T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials, or commodities or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the union as the collective bargaining representatives of its employees, unless and until the union had been certified as such bargaining representative in accordance with the provisions of section 9 of the NLRB Act. This notice was also posted at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers was resumed for awhile until Clark's interline business dropped noticeably after January 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington, and Wilson. Pickets, however, remained at Clark's terminal and were still there in March 1956. One of Clark's former employees

(employed prior to September 14, 1955) is a picket. No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On September 14, 1955, he had seven employees.

Clark sought further relief and the NLRB obtained a temporary injunction on behalf of Clark against the union signed by the Chief Judge of the United States District Court for the District of Nebraska on July 30, 1956. The order of the Court, pending final adjudication by the NLRB of the matter involving Clark and the union³, was calculated to enjoin picketing at the premises⁴ of motor carriers⁴ and shippers who did business with Clark and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where the object was to force or require said carriers or employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the Teamsters (Local No. 554) or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters or such other labor organization was certified as the representative of said employees in accordance with section 9 of the NLRB act. Thereafter, Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances are shown where D. M. T., Haeckl, Red Ball, Burlington, and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of inter-

3. Hearing on this matter was held before an NLRB examiner in May 1956.

4. Carters' premises specifically named in the order were those of Santa Fe Trail, D. M. T., I. N. T., Merchants, Bos, Independent, Wilson, Trans-American, and Red Ball.

state freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Santa Fe Trail, with one exception, has accepted freight from Clark. In nearly every instance Clark has been able to find a motor carrier willing to accept the interstate shipments. No instances are cited where rail carriers ever refused any shipments tendered by Clark. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments.

In regard to the NLRB proceeding involving Clark and the union, on December 26, 1956, an order was entered by NLRB requiring Teamsters (Local No. 554) to cease and desist from certain unfair labor practices in violation of section 8(b) (4)(A) and (B) of the National Labor Relations Act, and directing the union to take certain affirmative action, including the posting of a described notice. A copy of the NLRB order and a copy of the notice attached to that order are set forth in appendix C hereto. The NLRB order refers to certain employers at which premises notices should be posted by Teamsters Local 554. In addition to Clark, the employers identified in the NLRB record as affected by the Union's unfair labor practices are: C. A. Swanson & Sons; Omaha Cold Storage Company; Wilson Packing Co.; Swift & Co.; Santa Fe Trail; D. M. T.; Beacons Van & Storage Co.; Independent; I. N. T.; William A. Volker & Company; Bos; Sinclair Refining Company; Wilson Truck Lines; Red Ball; Haeckl; Merchants; and Darling Transfer Co.

Generally, the stockholders of applicant, with the exception of Clark, have had no dispute of strike with their employees. They are parties to certain tariffs published by certain rate bureaus and have executed concurrences for the interchange of freight on through routes and

through rates with various connecting motor carriers, including protesting motor carriers herein who also are parties to the tariffs published by the described rate bureaus. They hold themselves out to transport interstate freight on a through route-through rate basis. As to Clark, it has received only one cancellation notice on concurrences, from Riss and Company. If the authority sought herein is granted, the stockholders intend generally to enter into tariff concurrences with applicant and interline traffic thereunder.

SHIPPER EVIDENCE.

The shippers and consignees in support of the application are located at Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. Generally, with some exceptions, the traffic of these shippers and consignees involve less-than-truckload shipments.

Arcadia—The witness from this point operates the only drug store which serves an area of about 10 miles. No motor carrier serves Arcadia regularly other than Romans and that carrier is selected by the consignee to deliver his shipments which originate in or near St. Louis. Certain regular stock orders are received about twice a year, and additional shipments approximately every six weeks. Rail service is available to Arcadia, but freight trains do not arrive daily. Prior to the spring of 1956, motor carrier service was used more extensively than rail for the delivery of shipments and such service was satisfactory. After that time certain of consignees shipments which had been routed by motor carrier all the way from origin to Arcadia began to arrive by rail. In some instances Watson transported shipments to Grand Island and delivered them to the railroad for movement to Arcadia.

Some of the commodities involved were drugs which required expeditious delivery and the described combination motor-rail service was too slow. These shipments were routed by Watson and "Loup Valley", a carrier which had discontinued serving Arcadia. Since the shipments were routed by motor carrier the consignee expected that they would be delivered in this manner, and no authority was given to divert the shipments to rail. Some of the drugs require protection against freezing and because they are perishable motor carrier service is designated. Delivery of the described shipments by rail instead of motor vehicle resulted in drayage expenses and inconvenience to the consignee. Consignee has not given any consideration to using an originating carrier other than Watson from St. Louis, but has no objection to using Burlington to transport his shipments from that point. If the authority sought is granted, consignee would route shipments by applicant to Omaha or Grand Island and thence by Romans to Arcadia.

Burwell—Certain retail establishments at this point receive small shipments from Chicago, Des Moines, Kansas City, St. Louis, Minneapolis, and Denver, and pay the freight charges thereon. Prior to April, 1956, an automobile dealer received regular stock orders and rush shipments from Des Moines by motor carrier; also certain rush orders from Kansas City. On such traffic he specified Romans as the delivering carrier but did not designate the origin carriers. D. M. T. originated shipments in Des Moines, and the 2-day service rendered from that point was satisfactory. Red Ball originated the Kansas City shipments. After April 1, 1956, his shipments began arriving in Burwell by rail although he continued routing by Romans. In one instance the consignee was out of certain parts ordered from Kansas City. These were transported to Omaha by Red Ball and forwarded to

Burwell by rail. This type of service was too slow and inconvenient. In the three months prior to February 1957, however, the Kansas City shipments were again being delivered by Romans. D. M. T. also forwarded a Des Moines shipment from Omaha by rail to Burwell, which service was unsatisfactory and slower than the all-motor carrier service. In addition to the normal freight charges which consignee pays, certain other expenses were incurred on the combination motor-rail service. Consignee complained to its supplier in Des Moines and after July 9, 1956, some shipments were transported by D. M. T., and delivered by Romans. However, certain shipments routed by motor carrier from Des Moines were still delivered by rail. Since April, 1956, consignee has had difficulty in preparing its stock orders properly because of irregular delivery service. Sometimes when the placement of a current order is due, consignee has not yet received the previous order. In January, 1957, a shipment of parts from Des Moines was delivered by Romans. On Des Moines shipments, consignee has not requested its supplier to use a different origin carrier, although he has no objection to the use thereof.

A Burwell clothing merchant and a drug store owner have had experience similar to those of the automobile dealer. Shipments to them from Denver, St. Louis, and Kansas City routed by motor carrier have been diverted to rail. A shipment from Denver and two from St. Louis in the fall of 1956 destined to the clothing merchant were diverted by Watson to rail at Grand Island. In fact, from May through October, 1956, numerous shipments were received from St. Louis and Denver with some delivered by rail as described and some by Service Oil Company, hereafter called Service Oil, a competitor of Romans. Prior to the spring of 1956 this consignee had arranged to route most of his merchandise "by truck" and Romans,

who serves Burwell regularly, usually delivered the shipments. Consignee operates on a small inventory and prompt service is important. In or about October 1956, he requested suppliers to ship certain sized shipments by rail all the way because the combination rail motor service resulted in extra charges. Since then most of his shipments have been transported all rail and this is slower than the previous all-truck service. In January 1957, a shipment originating in St. Louis was delivered by Romans, and consignee desires the continuation of deliveries by that carrier. The drug store in Burwell, which pays the freight on some shipments, serves a substantial area, and it requires daily service by motor vehicle because its business is conducted on a low inventory. Rail service to Burwell is provided three days per week. Prior to the early summer of 1956, all its shipments from Chicago, St. Louis, Kansas City and Denver moved by truck and were delivered by Romans, which service was satisfactory. Thereafter, it began to receive shipments by rail. For example, a shipment in August was transported by Red Ball from Kansas City to Omaha and diverted to rail for delivery. This combined motor-rail service was slow and inconvenient. This consignee is willing to use a motor carrier for service from Denver to Grand Island for interchange with Romans at that point instead of Omaha.

A butter factory at Burwell ships truckloads of butter to Chicago. Each truckload, which moves about twice monthly, weighs 30,000 pounds, and is valued at \$18,000. Since the butter is perishable the shipper requires a dependable motor carrier service from origin to destination. Rail service is available from Burwell only on a tri-weekly basis, and shipper's factory is not located on a rail siding. The shipper does not route the traffic beyond Omaha, leaving it up to Romans to select a connecting carrier. Prior to March or April 1956, this arrangement was satisfactory.

and the butter usually was delivered in Chicago on the second day. In some instances the trailers of Independent were loaded in Burwell by Romans and the shipment moved to Chicago without transfer of lading. Watson was also used as a connecting carrier. After April 1956, on two occasions, the consignee in Chicago phoned the shipper to inquire about shipments that had not yet been received. Because of this and the prevailing situation there is some anxiety on the shipper's part concerning the delivery of its shipments. However, all butter shipments tendered to Romans have moved to destination, and generally deliveries have been made on the second morning. The owners of the butter factory also operate an oil company in Burwell, retailing gasoline, oil, tires, auto accessories, and certain related commodities. The oil company had not received any inbound shipments from Chicago since the spring of 1956 and its representative was not certain whether any had originated at Minneapolis since that time. Some tanks had been received from St. Louis in May or June 1956, but it was not known definitely how this traffic was shipped.

Ord—Since July 1, 1956 a leather goods store had received about 57 shipments and approximately 37 originated at Chicago, Minneapolis, St. Louis, Kansas City, Denver, St. Joseph, and Des Moines. Its business is operated on a small inventory and prompt delivery is required on most shipments. Since about 1952 Romans has been designated by consignee to deliver most of the traffic although occasional shipments move by rail. Rail, however, is not satisfactory because daily service is not available at Ord. During the last six months of 1956 certain shipments from St. Joseph, Denver, Kansas City, Minneapolis, St. Louis, and Denver were delivered by motor carriers other than Romans. For example, a shipment from Minneapolis in November on which the consignee had requested shipper's

salesman to route by Romans for delivery was transported to Grand Island by Watson and transferred to Portis Transfer, hereafter called Portis. Service Oil has also delivered some shipments. Certain shipments from St. Joseph and Denver were routed rail from those points by the suppliers. The service of the other delivering motor carriers is not as satisfactory as that of Romans because the latter conducts a daily service at Ord. This store has no objection to using Burlington as an origin carrier from the points that carrier serves, and consignee recognizes that its suppliers might not have specified Romans as the delivering motor carrier in all instances.

A clothing store at Ord receives shipments from Chicago, St. Louis, Kansas City, St. Joseph, Denver, and Des Moines. It pays the freight charges, and motor carrier service is used more than rail for the necessary transportation. For a long time Romans has been designated as the delivering carrier on shipments from St. Joseph and Kansas City, and Romans has also delivered some Chicago shipments. Railway Express Agency, Inc., is used on shipments from Denver and St. Louis. Motor carrier shipments are received from Des Moines about twice a year. In or about June 1956, consignee began receiving deliveries by motor carriers other than Romans. Portis, in particular, has been delivering most of the shipments. Also, a shipment originating at Chicago in September 1956, was transported by combination motor rail. Prucka transported this shipment from Chicago to Omaha and transferred it to rail for delivery to Ord. This type of service was slow compared to the all-motor service rendered in connection with Romans. Also, the service by Portis is unsatisfactory because deliveries are usually made in the afternoon whereas Romans makes morning deliveries. Portis was requested to make morning deliveries but could not do so under its operating schedules. The availability

of daily delivery service by motor carrier is important in the proper functioning of consignees business.

A firm at Ord prints and publishes newspapers, magazines, catalogs, advertising material, and engages in certain other related activities. It ships a considerable amount of material to Chicago and some to Kansas City and Denver. It also buys certain supplies machinery, and repair parts in Chicago, and certain supplies and repair parts in Kansas City. Motor vehicle service is used for certain shipments to Chicago regularly and some traffic moves to Denver in this manner. Shipments to Kansas City, Minneapolis and St. Louis usually do not move by truck. Prior to the summer of 1956 this shipper used Romans in conjunction with Independent for service to Chicago and such service was satisfactory because customers could usually be assured of delivery within four days. Since that time certain of the Chicago customers have complained about delays in getting some shipments, and witness indicates some shipments take seven days for delivery. Some of the material shipped, such as monthly magazines, is dated and prompt delivery at destination is required. Also, catalogs for certain seasons of the year require expeditious and dependable handling. Presently, shipper can not assure its customers definitely of deliveries within a specified time and shipper's representative believes it has lost some business due to this situation. Shipper permits Romans to select the connecting carrier used beyond Omaha and witness could not name any carrier other than Independent which had been used beyond that point. This shipper also designated Romans to deliver inbound shipments from Chicago, and sometimes it specified the origin carrier. The inbound service prior to the summer of 1956 was satisfactory, but after that time the transportation on some shipments was slow. Burlington has not been specified to originate any Chicago shipments. Prior to the spring of 1956 some ship-

ments from Kansas City were transported by Burlington to Omaha for delivery by Romans and this service was satisfactory. After that time, however, one shipment was received by rail but witness did not know whether or not it had been routed in this manner all the way from Kansas City.

Newman Grove—A farm implement and machinery company receives shipments of repair parts from Kansas City, Kans. Regular stock orders are received about once a month and supplementary orders about once a week. Prior to the summer of 1956 these shipments were transported by Red-Ball and Darling to Omaha and transferred to Lyon for delivery. Since that time carriers other than Lyon have been making deliveries. In some instances shipments were delivered by one of these other carriers to Neligh and the consignee had to pick them up at that point. Also, Roy has delivered some of the shipments to Newman Grove. Generally, the service of these carriers was not satisfactory because there had been some delays in receiving shipments and extra expense incurred by consignee. When Lyon delivered the shipments, service into Newman Grove was rendered four or five times a week. Roy does not render such frequent service. Frequent service, however, is required because some parts moving from Kansas City are needed by farmers to repair their harvesting machinery. Although rail service is available at Newman Grove, it is not rendered on a daily basis. Consignee has no objection to using Burlington or Santa Fe Trail as origin carriers if satisfactory service can be rendered.

A creamery in Newman Grove ships truckloads of butter regularly to Chicago. It selects Lyon to transport the shipments to Omaha, but does not designate the carrier beyond, although it has the privilege to do so. Usually, Lyon has interchanged the shipments at Omaha with I. N. T. Although on two occasions (in the summer) complaints

have been made on the condition of the butter when received at destination, most of shipments have been transported to Chicago satisfactorily. The creamery has not endeavored to obtain single-line motor carrier service from Newman Grove to Chicago or to route its shipments beyond Omaha over Burlington's line. Rail service is not used because it is not available daily at Newman Grove. In addition to outbound traffic, the creamery receives occasional shipments of supplies from Kansas City, Minneapolis and Chicago which are shipped by motor vehicle. The creamery does not designate the origin carrier on such shipments. It does, however, specify Lyon for delivery. In 1956 deliveries were made by other carriers. This was not satisfactory because of delays. In four months prior to February 14, 1957 most of the inbound shipments were delivered by Lyon. Abler and Clark delivered some shipments, and such service was satisfactory. The creamery is willing to use Burlington in connection with Abler and Clark if the traffic would move without delay. Rail is used for some inbound shipments but is not satisfactory for all, principally because such service at Newman Grove is provided less frequent than required.

Sargent—A department store at this point receives shipments from Kansas City, St. Louis, Minneapolis, Chicago, St. Joseph, and Des Moines. Prior to the summer of 1956, its traffic from these points was received by rail, motor carrier, and parcel post. Motor carrier shipments, with a few exceptions, were delivered by Romans, and such service was satisfactory. Consignee paid the freight charges on most shipments. Generally, consignee did not designate the origin carriers on the motor carrier shipments delivered by Romans. After the summer of 1956, motor carrier shipments began to arrive by rail and the receipt of merchandise was delayed; also, some extra expenses were incurred by the consignee. For example, a

shipment in August 1956 was transported by Prucka to Omaha and transferred to rail for delivery to Sargent. In early September, Merchants did the same thing on a shipment from St. Paul. Consignee then advised his suppliers to use all-rail service and since September 1956 deliveries of interstate shipments from the above-described origins have been made in this manner. Rail is a little slower than the all-motor service. Consignee is aware of no motor carrier other than Romans who serves Sargent regularly. One of Romans' drivers suggested that consignee route its traffic via Grand Island instead of Omaha but this advice was not followed.

A retail hardware store at Sargent receives shipments from Kansas City and St. Joseph. Prior to the summer of 1956, it used motor carrier service for transportation. Some of its customers, particularly contractors, desire expeditious deliveries of merchandise and motor carrier service is needed to satisfy their demands. Romans and another motor carrier (which sold its business) delivered most of the shipments and such service was satisfactory. Consignee began receiving its shipments by rail and in September 1956 it changed to that mode of transportation. Thereafter, it changed back to motor service. It designates Romans to suppliers' salesmen for deliveries but does not specify the origin carriers. In January 1957, consignee began receiving satisfactory service again with Romans as the delivering carrier.

A dealer in farm machinery, implements, and supplies, receives motor carrier shipments from a point near Minneapolis. The prior service with Romans as the delivering carrier was satisfactory, but in September 1956, consignee requested its supplier to use rail the entire distance. This resulted from the fact that D. M. T. had transported a shipment to Omaha and transferred it to rail for delivery to Sargent. Rail deliveries are not satisfactory because

daily service is not available at Sargent. Daily service by motor carrier is required for some shipments, particularly on parts which are needed by farmers for repair work. Consignee is not aware of any motor carrier other than Romans who serves Sargent regularly. When prior motor carrier service was used consignee attempted to designate the origin carrier in certain instances but the supplier did not follow such designations.

Pierce—A hardware merchant at this point receives merchandise from Minneapolis and most of the shipments are transported by truck. He operates on a low inventory and prompt deliveries by motor vehicle are required. Although he designates the delivering carrier, suppliers select the origin carrier. Prior to March 1956, Hess Motor Express, Inc., (now Murphy Motor Freight Lines), hereafter called Hess, transported the shipments from Minneapolis to Sioux City, and Abler delivered them to Pierce. This service was satisfactory. In March 1956, Hess refused to transfer certain Minneapolis shipments of consignee to Abler because the latter was a nonunion carrier. Consignee needed the merchandise involved, and traveled to Sioux City personally to pick up the shipments. After this experience he tried using rail service which was not satisfactory. He changed back to motor service and Middlewest Motor Freight (now Barber Transportation Company), hereafter called Middlewest, began delivering shipments. This service from Minneapolis is not as fast as that rendered when Abler made deliveries prior to March 1956. If applicant is granted authority from Minneapolis, consignee believes it can obtain satisfactory service by way of Omaha even though this is a more circuitous route than shipment via Sioux City.

Tilden—A retailer of petroleum products, tires, and accessories receives shipments from Des Moines and Kansas City by motor vehicle. He designates Clark to handle

deliveries and the suppliers select the origin carriers. Prior to the spring of 1956, the motor carrier service with Clark making deliveries was satisfactory. Since that time deliveries have been made by Middlewest, Abler, and Lyon. Shipments handled by Middlewest moved through Sioux City to Neligh, and are then delivered from that point to Tilden. Usually, about one week is required to deliver shipments from Kansas City and Des Moines. Consignee receives better service than this when the shipments are handled by Abler because Omaha is used as an interchange point instead of Sioux City.

Loup City—A dealer in farm equipment and small trucks receive shipments of truck parts from Kansas City. Prior to the summer of 1956, Romans and his predecessor, Loup Valley, delivered this traffic. Consignee paid the freight charges on some shipments and others were prepaid. Consignee had been routing this traffic via Darling from Kansas City to Omaha and thence by Romans to Loup City. In or about June 1956, deliveries were made by Arrow Freight Line, hereafter called Arrow. This was satisfactory, except Arrow delivered shipments in the afternoon whereas Romans made morning deliveries. Arrow, however, discontinued serving Loup City directly and transferred the shipments to Romans or Service Oil at Grand Island, which resulted in three-line service and consignee received its merchandise a day or two later.

Neligh—An automotive dealer at this point receives emergency shipments of parts from Des Moines. Normally, these shipments were transported by D. M. T. to Omaha and thence to Abler or Clark, which were designated by consignee, for delivery. Usually, three-day service was rendered by the described carriers and such service was satisfactory. In the spring of 1956, Middlewest and Lyon began to deliver shipments and delays in receiving parts occurred. Instead of three-day service from

Des Moines consignee in some instances received five-day service. Lyon's service usually has been quicker than that of Midwest. Although the supplier at Des Moines, on many shipments, attempts to honor consignees' designations of delivering carriers, it does not do so in all instances. On some occasions, at consignee's request, Burlington has been used from Des Moines. The supplier, however, usually selects the origin carrier, and D. M. T. is used more frequently than Burlington. In some instances, when Burlington originated shipments, the service has been satisfactory, and at other times it has not. It is indicated, however, that shipments moving via Burlington and Abler have been transported satisfactorily. Recently, when Burlington was used from Des Moines, Abler rendered the delivery service.

Norfolk—A tire dealer, who operates on a small inventory, receives shipments principally from Kansas City, Chicago and St. Louis. Clark and Abler, which were designated by consignee, delivered the shipments and this service was satisfactory. In the fall of 1955, consignee began receiving shipments by other carriers. For example, a shipment from Kansas City was transported by Red Ball to Omaha and transferred to Roy instead of Clark. Consignee refused delivery by Roy, and the shipment was returned to Omaha. The merchandise finally was reshipped from Omaha and delivered by Clark. A shipment from St. Louis routed over Watsons' line for transfer to Clark was delivered by Roy. The service rendered by Roy is comparable to that rendered by Clark and Abler from Omaha to Norfolk. Recently, Burlington has been used for some shipments from Chicago and Kansas City, and these were transferred to Clark as requested. Such service was satisfactory. On other shipments from those points consignee's routing instructions were not honored by the suppliers who used other origin

carriers. Freightways has transported some shipments from Chicago and transferred them to Midwest. Since October 1956, consignee's shipments, with some exceptions, have been delivered by Clark and at the time of hearing service was reasonably satisfactory.

A seed dealer at Norfolk receives shipments principally from Kansas City, Des Moines, and Chicago, and occasional shipments from Minneapolis and St. Louis. It operates on a small scale and requires expeditious transportation in some instances to replenish its stocks. It does not use rail service. It pays the freight on some shipments and the suppliers on others. In the summer of 1955 most of the shipments from Kansas City were transported by Watson, Prucka, Red Ball and Burlington, and transferred to Abler or Clark at Omaha for delivery. This service was satisfactory. In or about July 1956, consignee began receiving deliveries by other motor carriers, including Roy. In September 1956, it requested the Kansas City supplier to use Burlington and since then shipments from that point have been received satisfactorily. It has not designated specific origin carriers from Des Moines or Chicago. Usually, Watson originates the shipments from Chicago, Minneapolis, and St. Louis, and Burlington from Des Moines.

A dealer in outboard motors, boats, marine hardware and related articles receives shipments from Kansas City, and St. Joseph, on which he pays the freight. He does not maintain a larger stock of boats or motors, and frequently customers' purchases are ordered directly from the supplier. Therefore, expeditious transportation is required. Prior to April 1956, Darling transported the shipments from St. Joseph and Kansas City to Omaha and Abler delivered them. Consignee designated such service and it was particularly satisfactory because Abler notified the consignee prior to actual delivery of certain boats and

other bulky merchandise. This permitted consignee to arrange deliveries directly to his customers. In some instances Clark was used and provided a similar service. In or about April 1956, deliveries were made by other motor carriers, including Roy, even though Abler was still designated by consignee to handle the shipments. In January 1957, however, consignee routed a shipment from St. Joseph by Burlington and this was delivered by Abler. Apparently this service was satisfactory.

A retailer of plumbing fixtures, water softeners, and related supplies receives shipments from Chicago on which it designates the routing. Prior to September 1955, it used either Independent or Freightways from Chicago to Omaha and thence Abler or Clark to Norfolk. Since then the shipments have been delivered by other carriers, including Roy and Midwest. In or about December 1956, consignee began routing its shipments from Chicago via Burlington; when Abler was specified as the delivering carrier, the routing was followed, but when Clark was designated the shipments usually were delivered by Roy. Consignee has no objection to using Ringsby from Chicago to Omaha if its service is as good as that of Burlington.

A dealer in heating and air conditioning equipment receives most of its shipments from Marshalltown, Iowa, and occasional freight from Des Moines, Chicago, Kansas City, and St. Louis. It pays the freight on this traffic, and routes the shipments from Marshalltown. The suppliers at Chicago, Kansas City, and St. Louis select the carriers used from those points and the dealer designates the delivering carrier. The dealer installs equipment in buildings at Norfolk and points nearby. Frequently, shipments from the described origins are made direct to the job sites. Prior to the fall of 1955, Bos was used from Marshalltown to Omaha and Clark delivered the shipments. This service was satisfactory, particularly since Clark made deliveries

direct to job site and operations of the dealer, and its installation crews could be conducted efficiently. Although in 1956 Clark was still designated by the dealer on routings, certain shipments were delivered by other motor carriers, including Roy. Since the dealer was not certain his shipments would be delivered by Clark, some equipment which normally would have been routed directly to nearby job sites was routed to Norfolk. Clark is located at Norfolk, and the dealer finds it convenient to obtain information from that carrier concerning its shipments. He tried rail service on a shipment from Marshalltown but this was too slow to meet his needs. The dealer has no objection to using Santa Fe trail for shipments from Kansas City. It has complained to Bos about disregarding routings, but still receives shipments by carriers other than Clark.

A processor of dairy products at Norfolk receives shipments principally from Chicago, and some traffic from Denver, Kansas City, St. Louis, Des Moines, and Minneapolis. It pays the freight charges on a large percentage of the shipments from Chicago. Although it designates Clark and Abler for delivery of shipments, the suppliers usually select the origin carriers. Watson and Burlington, among others, have been used from Chicago. When Abler and Clark were used for deliveries, the service was satisfactory. In the latter part of 1955 deliveries were made by motor carriers other than those designated, including Roy and Middlewest. Delays occurred, and consignee complained to Watson. However, shipments from Chicago originated by Watson continued to be delivered by Roy.

The Young Men's Christian Association at Norfolk receives shipments of various supplies from Chicago, Kansas City, and St. Louis, and pays the freight charges thereon. Prior to September 1955, Clark was designated as the delivering carrier, and service by motor vehicle from the

above-named points was satisfactory. After that time consignee's designations of Clark were disregarded on numerous shipments and deliveries were made by other carriers, including Roy. Consignee has requested suppliers in Chicago to use Burlington, and those at Kansas City to ship by Santa Fe Trail. Shipments from those points are still delivered by Roy contrary to routings. In one instance, although Santa Fe Trail in conjunction with Roy rendered second day service on a shipment from Kansas City to Norfolk, consignee refused to accept it. It was ultimately delivered by Clark. The Norfolk Chamber of Commerce also supports the application.

Columbus—A company at this point is engaged in manufacturing farm and industrial equipment, including corn cribs, grain bins, crop-drying machines, and power steering devices. It receives various raw materials in considerable quantities from numerous points, including Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Ill., and Hammond, Ind. The majority of the inbound shipments are carloads transported by rail, and motor carrier service is used also. Outbound shipments are made to various points. During the last ten months of 1956 it made slightly over 1,200 shipments from Columbus, and 57 of these were destined to points on the routes involved herein. Prior to the summer of 1956 Lyon was used satisfactory as the originating carrier on some outbound shipments and delivered certain inbound traffic. Since then certain shipments routed from Columbus over Lyon's line have not been accepted by connecting carriers. In addition to Lyon a number of other motor carriers served Columbus directly, including Watson, Ringsby, Bos, Freightways. Also, this manufacturer operates some of its own motor vehicles. Generally these are used to points such as Chicago, where inbound shipments can be picked up for return to Columbus. Watson and Freightways have been

used for some shipments from Chicago to Columbus and such service was satisfactory.

Fairbury—A chain organization engaged in operating variety and department stores receives a wide range of commodities from Minneapolis, St. Paul, Chicago, Kansas City, and St. Louis. A considerable amount of the shipments from these points is transported by motor carriers. Consignee pays the freight charges on about 75 percent of these inbound shipments, and instructs its suppliers to use McKay as the delivering carrier. Various motor carriers have been used from the origins, including Burlington, Watson, and D. M. T. The motor carrier service prior to April 1956, was satisfactory. After that time consignee's designations of McKay were not honored, and it began to receive deliveries by Superior. That service, however, was not maintained with sufficient regularity to satisfy the consignee. Because its motor carrier routings were not honored completely, consignee began using rail service more extensively. Such service, however, is slower than the prior motor carrier service rendered in conjunction with McKay. Although Superior was still delivering some shipments in or about the latter part of 1956, McKay was not delivering any at that time to consignee.

A wholesale and retail store engaged in selling paint, wallpaper, floor coverings, and other merchandise receives shipments by motor carrier from St. Louis, Chicago, Lyons and Joliet, Ill., Kansas City, Minneapolis-St. Paul, and Des Moines. Prior to April 1956, most of the motor carrier shipments from the described origin points were transported by Watson to Lincoln and thence McKay to Fairbury. This service was satisfactory. Then other carriers, including Superior, began making deliveries contrary to designated routings. Consignee is not satisfied with Superior's service entirely because there have been some delays. Shipments from Chicago, in which consignee is

particularly interested, were not received as expeditiously as formerly. Consignee attempted to route Chicago shipments via Burlington but the supplier used other originating carriers, including Watson and Independent. In May 1956, consignee began using rail transportation more extensively from Chicago, which is slower than the service previously rendered by Watson and McKay.

A company at Fairbury manufactures pump jacks, cylinders, water supply equipment, and windmills. It is also a wholesaler of plumbing supplies. It receives shipments from Chicago, Kansas City, St. Louis, Des Moines, and Denver. Finished products are shipped from Fairbury to various points. The majority are routed by the consignees, and some by the manufacturer. It has used the joint service of McKay-Watson on shipments moving to certain undisclosed destinations in Iowa and Illinois. Prior to April 1956, a majority of the inbound shipments were delivered by McKay, whom the manufacturer designated on most orders. This service in conjunction with the origin carriers was satisfactory. In April 1956, Superior began delivering shipments, but such service was not entirely satisfactory because delays occurred in receiving merchandise. The manufacturer's purchasing agent was then instructed to use rail as much as possible for shipments from Chicago. However, this shipper still routes many shipments by McKay, who makes some deliveries, and such service has been satisfactory. The manufacturer is still not entirely satisfied with Superior's service. It has no objection to using Burlington or Ringsby as origin carriers from Chicago. On outbound shipments the manufacturer honors consignees' routings, and McKay is designated in some instances to originate shipments.

Lincoln—A wholesale drug company receives shipments from various points. Most of its traffic originates in Chicago, St. Louis, and Kansas City. Since its warehouse

space is limited, it buys in small quantities. Because of this method of operation expeditious deliveries by motor carrier are required. Various motor carriers are used to originate shipments from Chicago, including Independent, Red Ball, Haeckl, Freightways, Watson, and Prucka; Burlington. Watson, and Freightways are used extensively from St. Louis; and Red Ball, Watson, Prucka and Freightways from Kansas City. No complaint is made regarding the service from St. Louis and Kansas City, but dissatisfaction is expressed concerning the delay in receiving some shipments from Chicago, particularly in the winter in respect of commodities requiring protection from freezing. Consignee complained to Red Ball who is rendering single-line service to Lincoln, and discovered that carrier did not always have protective equipment available for daily service to Lincoln. Sometimes shipments requiring such protection were loaded in equipment moving to Omaha and at other times they were held in Chicago until such equipment was available for Lincoln. Carriers other than Red Ball provide protective service from Chicago, and Burlington in particular is willing to provide such service to consignee.

A large department store in Lincoln receives shipments from Chicago, Minneapolis-St. Paul, Denver, St. Louis, Kansas City, St. Joseph, and Des Moines. Most of the shipments are received collect. The stores advertising schedules and receipt of merchandise are coordinated and for this reason delays in transportation are avoided as much as possible. Various motor carriers are used for service from Chicago, including Red Ball, Watson, Freightways, and Haeckl. Red Ball transports most of the traffic from Chicago. Generally, it renders second and third morning deliveries, and service from that point, with some exceptions, has been reasonably satisfactory. Carriers used from St. Louis include Burlington and Watson. Generally, Burlington has provided second and third morning delivery

service which is satisfactory. Service from Kansas City is rendered by various carriers, including Red Ball, Watson, and Burlington. Red Ball transports most of its shipments from Kansas City and such service generally has been satisfactory. The service of other origin carriers from Kansas City has been satisfactory, with some exceptions. Freightways is used for most shipments from Minneapolis, and service from Minneapolis-St. Paul is reasonably adequate. Red Ball is used for shipments from St. Joseph, and, with some exceptions, the service has been reasonably adequate. The service from Des Moines and Denver also has been reasonably adequate. Consignee's representative is aware that shipments from Chicago, Minneapolis-St. Paul, Des Moines, and Denver, if transported in single-line service by applicant to Lincoln, would have to move through St. Joseph, providing a circuitous routing. Use of applicant's proposed operation would depend on its ability to render service comparable to that provided by existing carriers.

Omaha—A heating and air conditioning equipment contractor receives most of its traffic from Marshalltown, and occasional shipments from Kansas City, Chicago and Denver. It pays the freight charges on such shipments. Usually, most of the installations are made by consignee between May 15 and October 15 of each year. His storage space is limited and dependable motor carrier service is required for a continuous flow of merchandise. Normally, Bos is used to transport the shipments from Marshalltown to Omaha. Between May 1, and October 1, 1956, the Sheet Metal Workers Union placed certain pickets at the contractor's place of business and at certain job-sites where he was making installations. The pickets were not his employees or former employees. It is indicated that the contractor and his employees had refused to join the Sheet Metal Workers Union. Although Bos continued to deliver

these shipments to Omaha-it would not make deliveries direct to the consignee because of the pickets. The consignee, therefore, used his own small truck and some of his skilled employees to pick up shipments at Bos' terminal in Omaha. He then endeavored to use I. N. T. from Marshalltown but that carrier's drivers would not make direct deliveries past the pickets either. Consignee is not aware of any single-line motor carrier service from Marshalltown to Omaha other than Bos and I. N. T. Railroad service has been used also but consignee was required to pick the shipments up at the rail carrier's freight depot. Since about October 1, 1956, Bos has been making deliveries direct to consignee's place of business because the picketing had ceased.

A manufacturer in Omaha, hereafter called shipper, makes various wood products, including frames for upholstered furniture, bases for television sets, and cabinets. Shipments are made to Chicago, Minneapolis, St. Louis, Kansas City, Des Moines, and Denver. Also, inbound shipments of various materials are received from these points. The above-described bases require continual expeditious transportation from Omaha for delivery in Chicago at certain times to coincide with production of the television sets. Cabinets also require expeditious transportation. Prior to October 18, 1956, shipper used numerous motor carriers, including Prucka, Watson, Freightways, Merchants, Independent, Ringsby, and Santa Fe Trail for service to and from its plant. Rail service is used for outbound carload shipments. Shipper, however, does not use less-than-carload service of the railroads very extensively. It prepays some outbound shipments. Shipper routes some inbound shipments, and others are routed by the suppliers. On or about October 11, 1956, a representative of the Upholsterers' International Union of North America, AFL-CIO, requested shipper to rehire certain employees who had been discharged. Additionally, the Upholsterers' Union re-

requested that its business agent be recognized as bargaining representative for shippers' employees. Apparently, the Upholsterers' Union had filed with NLRB unfair labor practice charges against shipper and no determination had yet been made on such charges, and no election had been held by the employees to certify that Union as their bargaining representative. On October 18, 1956, about 15 employees went on strike and approximately 85 continued working. Thereafter, drivers of the carriers which shipper had used formerly would not pass the picket lines to pick up or deliver merchandise. Shipper, therefore, had to engage local cartage companies to pick up or deliver its freight at terminals of the line-haul carriers. Shipper spent about \$500 weekly in obtaining the service of local cartage companies. This situation continued until January 28, 1957, when the unfair labor practice charges were withdrawn by the Upholsterers' Union. Thereafter, the line-haul carriers resumed pick up and delivery service at shipper's plant.

A storage company operates two storehouses in Omaha. General commodities, with some exceptions, are stored for numerous shippers, including some nationally known tobacco manufacturers and certain packinghouses. Generally, the shippers' commodities are moved to the warehouse and reshipments are made from time to time therefrom to various destinations. In some instances, on both inbound and outbound traffic, the storage company is permitted to route shipments. Rail and motor carriers have been used to and from the warehouses, and prior to May 1956, the transportation service was satisfactory. The list of motor carriers which it has used includes Freightways, Watson, D. M. T., Brady, Prucka, Santa Fe Trail, Bos, Darling, Ringsby and Red Ball. In 1956, up until May 18, merchandise (not including household goods) received by motor vehicle at the Omaha storehouses approximated 7 mil-

lion pounds, and a substantial amount of this traffic originated in Chicago, Kansas City, St. Louis, and Minneapolis. Since about May 24, 1956, when a picket of Teamsters was placed at each of the storehouses in Omaha, deliveries by the line-haul motor carriers ceased generally, and only sporadic interstate shipments have been moved to the warehouses by for-hire motor carriers. In some instances shippers did not know there were pickets at the storehouses, and forwarded merchandise to Omaha. This resulted in the tracing of shipments to the terminals of certain carriers, and occasionally shipments had been moved to the storehouses of competitors. Prior to the placement of pickets, Teamsters had requested the storage company to pay its employees established union wage rates. The employees of the warehouses are not members of Teamsters and the latter did not represent them. The storage company has never been advised by the NLRB of any charges being filed with that agency by Teamsters. It had not instituted any action of its own with the NLRB.

Customers were informed of the situation in Omaha, and the storage company began using rail for inbound shipments normally transported by motor vehicle. On June 30, 1956, it lost the account of one large meat packer whose products had been stored in Omaha and reshipped to various points in Iowa, including Marshalltown, Cedar Rapids, Boone, Ames, Des Moines, Davenport, Carroll and Dennison. Because of the existing situation it is said that the storage company is placed at a competitive disadvantage. From time to time since May 24, 1956, it has attempted, without much success, to obtain normal service again direct to the warehouses by the described line-haul motor carriers. Recently, some meat products (which do not require refrigeration) have been transported satisfactorily from Chicago by W. N. Morehouse, Nelson Truck Line, and E. E. Haugarth. Apparently, however, these carriers are re-

stricted to the transportation of packinghouse products. In respect of outbound service, as recently as February 20, 1957, it attempted without success to obtain a pick up by some line-haul motor carriers of a small shipment of personal effects for transportation to Chicago. Generally, the drivers of the line-haul carriers have continued to refuse to pass the pickets at the storehouses.

A representative of the Nebraska Resources Foundation testified in support of the application. Generally, this organization is engaged in bringing in new industries to Nebraska. In recent years it has been instrumental in obtaining the establishment of new factories at certain points in Nebraska, including Lincoln, Kearney, Columbus, Hastings, and Fremont. When attempts are made to induce industries to locate in Nebraska the question of adequate transportation in and out of the new plant sites is important. This representative believes that the more transportation service Nebraska has available the better it will be able to compete with other areas for new industries.

The former owner of Independent, under subpoena by applicant, also testified. Prior to January 1956, Independent interchanged with certain carriers, including Abler, Clark, Lyon, McKay, and Romans. In fact, from January 1 to September 1, 1956, Romans leased terminal facilities from Independent at Omaha. In May of that year, however, Independent refused to interchange certain shipments with Romans. Witness recalled that he understood at that time that Romans was involved in a labor dispute and that the management of Independent was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it that was their own responsibility."

Galveston Truck Line Corporation, hereafter called Galveston Truck, intervened in support of the application.

That carrier holds certain certificates from this Commission in No. MC-8544 and subnumbers thereunder authorizing operations in interstate or foreign commerce as a motor common carrier, over irregular routes, of general commodities, with exceptions, from and to certain points and areas in Texas and Oklahoma. It is authorized also to transport specified commodities from and to certain points. In No. MC-8544 (Sub-No. 15) an application is pending before the Commission in which Galveston Truck seeks authority to extend its general commodity operations from and to certain points, including Kansas City, Kans., and the commercial zone thereof. Intervener, a nonunion carrier, is interested in and supports the instant application because it desires to interchange traffic with applicant at Kansas City if its own extension application is approved and applicant obtains the authority sought herein.

The testimony of an inspector at the Nebraska State Railway Commission was also offered by applicant. This testimony involved principally the service rendered by Portis between Grand Island and Ord. Portis interchanges interstate traffic at Grand Island with certain carriers, including Watson, and the evidence indicated that Portis does not render daily service between Grand Island and Ord.

Certain other consignees located at Arcadia, Norfolk, and Ord were present at the hearing in support of the application. It was stipulated by counsel that if called as witnesses their testimony both on direct and cross-examination would be the same or similar to that presented by other witnesses from the same points. If the authority sought is granted, the supporting shippers and consignees generally would route their traffic over applicant's line for connection with the operations of the stockholders, principally at Omaha and Grand Island.

EVIDENCE IN OPPOSITION TO THE APPLICATION.

Evidence in opposition to the application was offered by Burlington, D. C. T., Freightways, I. C. X., Independent, Interstate Motor, Navajo, P. I. E., Red Ball, Ringsby, Santa Fe Trail, and Watson. The evidence presented by these motor carriers also included testimony by representatives of Barber and Roy. On behalf of the railroads evidence in opposition was offered by the Chicago, Burlington and Quincy Railroad Company, Chicago and North Western Railway System, Chicago, Rock Island and Pacific Railroad Company, Missouri Pacific Lines, and Union Pacific Railroad, hereafter called C. B. & Q., C. N. W., C. R. I. P., Missouri Pacific, and Union Pacific, respectively. Each of the opposing motor common carriers hold certificates from this Commission authorizing the transportation of general commodities, with exceptions, in interstate or foreign commerce, between various points over specified regular routes. Collectively, the routes over which these motor carriers are authorized to operate coincides substantially with those described in the instant application, and they serve the principal points named therein. Freightway's operations almost completely duplicate those sought, except that it has no routes between Kansas City and St. Louis. Burlington operates between Omaha and Lincoln on the one hand, and, on the other, Chicago, St. Louis, Des Moines, Kansas City, St. Joseph, and Denver, and it serves numerous intermediate points, including Grand Island. Red Ball serves Omaha, Lincoln, and Grand Island, and numerous other Nebraska communities, and its routes extend from those points to Denver, Kansas City, St. Joseph, Chicago, and Sioux City. Watson also serves numerous Nebraska communities, including Grand Island, Norfolk, Fremont, Columbus, Omaha, and Lincoln, and its routes extend from those points to Minneapolis-St. Paul, Des Moines, Chicago, Kansas City,

St. Joseph, St. Louis and Denver. It also serves Marshalltown. / It renders daily service from Omaha to Lincoln, Fremont, Columbus, Grand Island, and Hastings. Ringsby's operations between Denver and Chicago via Omaha and Des Moines, includes service to various Nebraska points, including Lincoln, Grand Island, Fremont, Norfolk, and Sioux City. Generally, however, unless Ringsby has a truckload for Norfolk, service to that point is rendered by interchange. Similarly, although Independent holds authority to serve Lincoln, it interchanges less-than-truckload shipments moving to or from Lincoln with connecting carriers at Omaha. Truckloads, however, are delivered to Lincoln direct. Freightways can render direct service between Marshalltown and Omaha.

Terminals are maintained by protestant motor carriers at various points in the area involved. Most of them have terminals at Denver, Omaha, Chicago, and Kansas City, and some have terminals at St. Joseph, St. Louis, and Lincoln. Certain of the carriers have terminals at St. Paul, Sioux City, Des Moines, Grand Island, the Freemont. Additionally, Watson has a terminal at Columbus, which is shared with another carrier. These protestants operate numerous motor vehicles including certain refrigerator equipment. Service is rendered daily by them between the principal points they are authorized to serve, and normally they use either a relay system or two drivers on a vehicle for continuous operation of their equipment between terminals. For example, Watson operates overnight schedules between Omaha, on the one hand, and, on the other Chicago, Denver, Des Moines, Kansas City, St. Louis, and Minneapolis-St. Paul; and second morning service between Chicago and Denver. Daily service is rendered from Chicago, St. Louis, Kansas City, St. Joseph, and Denver to Lincoln. Red Ball operates daily schedules between Chicago, on the one hand, and, on the other, Omaha,

Lincoln, Sioux City, and Denver; between Kansas City, on the one hand, and, on the other, Omaha, and Lincoln, including service at St. Joseph; between Omaha and Denver, and Omaha and Sioux City. Overnight schedules are operated by Red Ball in the majority of instances, although it is apparent that operations between Chicago and Denver would take longer resulting in second morning or second day service. Service rendered by D. C. T. between Chicago and Denver, and between St. Louis and Denver is second morning or second day. Interstate Motor also offers second morning service between Chicago and Denver, and between Kansas City and Denver. Independent offers second morning service between Chicago and Denver, and so does Freightways.

Generally, the equipment of the opposing motor carriers is not being operated to capacity, and they are in a position to transport additional traffic. Interstate Motor transports more traffic westbound from Chicago and Kansas City to Denver than it does in the reverse direction. It is anxious, therefore, to obtain additional eastbound traffic from Denver. I. C. X. also desires to obtain additional traffic from Denver moving eastbound to balance its westbound operations from Chicago. Ringsby is interested, among other things, in obtaining additional traffic from Chicago and Denver into Omaha where it has established its own terminal. Representatives of the opposing carriers believe a grant of the authority sought herein would affect protestants adversely. Freightways, for example, suffered a decline in gross revenue in 1956 of about \$200,000, and it made only a slight profit in 1956.

The opposing motor carriers transport a considerable volume of traffic between the points they serve and they interchange with connecting carriers at various points. Omaha is one of the principal points for interchange of traffic, and considerable interchange is performed at Lin-

coln, Grand Island, and Sioux City by certain of the opposing motor carriers. Certain of the evidence pertaining to interchange at Omaha, Lincoln, Sioux City and Grand Island is pertinent here. Burlington offered exhibits covering generally a period during the last six months of 1956, and January 1957. This evidence shows that Burlington has continued to interchange with applicant's stockholders at Omaha and Lincoln on interstate traffic originated at or delivered to various points in Nebraska. Specifically, numerous interstate shipments were received by Burlington at Omaha from McKay, Clark, and Abler, and some from Romans, Superior, and Lyon. Numerous interstate shipments were transferred at Omaha to Romans, McKay, Clark, and Abler. During the same period of time Burlington interchanged numerous interstate shipments with McKay and Lyon at Lincoln. Some of the shipments included in Burlington's exhibits cover shipments of certain supporting shippers or consignees, originating at or destined to Norfolk, Arcadia, Sargent, Ord, Fairbury, Neligh, and Burwell.

In 1955, and 1956, at Omaha, Santa Fe Trail interchanged interstate traffic moving from and to Nebraska points with Abler, Wilber, Clark, Peters, Lyon, McKay, Pawnee Transfer, Romans, and Steffy; also, with Superior Transfer, in 1956. In most instances Santa Fe Trail delivered considerably more traffic to these carriers than it received. During the same years at Lincoln it interchanged traffic with McKay, and in 1956, with Winter and Tillman.

A representative list showing a portion of the interstate shipments interchanged by Independent at Omaha during 1956 (except January) shows that most of the traffic was given to Roy for delivery to Norfolk, Pierce, Newman Grove, Neligh, Meadow Grove, and Tilden. Certain shipments for Ord, North Loup, and Loup City were transferred to Arrow. United Freight received some for

Loup City, Ord, and Burwell, and a carrier named Burnham received a shipment for Burwell. With respect to certain unrouted shipments for Norfolk and Pierce, which were transferred to Roy, examination by applicant's counsel of the freight bills covering such shipments revealed that "Abler" had been written thereon by Independent's routing clerk and then scratched over in favor of Roy.

An exhibit offered by Red Ball shows that it interlined approximately 430 shipments at Omaha in November 1956 destined to various Nebraska points which are served either by Abler, Clark, Lyon or Romans. All of these shipments, however, were given to carriers other than Abler, Clark, Lyon and Romans for delivery. The list of connecting carriers which delivered the shipments includes Schuyler Transfer, Interstate Freight Lines, and Mauch Transfer, hereafter called Schuyler, Interstate Freight, and Mauch, respectively, and Roy, Heuton, Brandt, and Service Oil. During the same month Red Ball received about 17 shipments collectively, from Roy, Schuyler, Interstate Freight, Mauch and Brandt, for movement to points beyond Nebraska.

A representative list of over 500 interstate less-than-truckload shipments interchanged at Sioux City by Watson on traffic moving to Nebraska points, from May 1, 1956 to and including January 31, 1957, shows Middlewest as the connecting carrier in most instances, with Barber and D. & T. Transfer, hereafter called D. & T., receiving some shipments. Many of the shipments originated at points on the routes over which applicant seeks to operate. Routings on about 40 of the shipments were disregarded by Watson and given to a carrier other than the one specified. During the same period of time Watson interchanged numerous interstate shipments at Omaha destined to points in Nebraska, and in certain instances disregarded the routings shown on the freight bill. Watson also offered

evidence showing interchange of 94 interstate shipments at Grand Island, between September 27, 1956 and January 16, 1957, destined to Ord. All of these shipments were transferred to Portis, although 21 were routed for delivery by Romans. In respect of service involving the supporting department store at Lincoln, during the last 8 months of 1956, a representative list shows Watson delivered directly to the store numerous shipments which originated at Kansas City, St. Louis, Minneapolis, St. Paul, Chicago, and St. Joseph, and the transit time in most instances was one or two days. An exhibit was offered also by Watson showing that it had transported numerous shipments originating at various points beyond Nebraska, including Kansas City, Chicago, Minneapolis, St. Paul, St. Louis, Denver, and St. Joseph directly to Columbus.

An exhibit of Freightways shows that this protestant from January 20 to September 4, 1956, interchanged over 900 less-than-truckload interstate shipments at Sioux City, and Omaha, collectively, destined to various points in Nebraska. A considerable amount of this traffic originated at numerous points on the routes over which applicant seeks authority, and the list of connecting carriers to which the shipments were given at Omaha and Sioux City includes Middlewest, Roy, Brandt, Schuyler, Interstate Freight, Arrow, Heuton, D. & T., Mauch, Superior, Wilber, Abler, Romans, McKay, and Steffy. Considering the number of shipments involved, applicant's stockholders received a small amount of traffic compared to that given to Middlewest, Interstate Freight, and some of the other connecting lines. Shipments to Fremont were transported directly to that point by Freightways. Although Freightways can serve Norfolk, O'Neill, Valentine, Columbus, Grand Island, Hastings, West Point, Neligh, and Schuyler, Nebr., on certain days it does not have sufficient freight to justify operation of a vehicle to those points and the traffic

is interchanged with connecting lines to expedite deliveries. Numerous shipments were transported by Freightways from Chicago, St. Paul, Denver, and Kansas City to the described department store at Lincoln, from July 30, 1956 through January 29, 1957; generally, transit time on the Chicago, St. Paul and Denver shipments ranged from two to three days, and the Kansas City shipments from one to three days.

Barber, since about January 2, 1957, has operated under the general commodity certificate formerly held by Midwest in No. MC-30857. That certificate authorizes operation in interstate or foreign commerce over specified routes between Ainsworth, Nebr., and Sioux City, and between Neligh and certain other points in Nebraska. By certain recently acquired general commodity authority, Barber also operates between Valentine and Omaha over certain specified regular routes. It maintains terminals at certain points, including Omaha and Norfolk, and operates numerous vehicles. One of its vehicles leaves Omaha daily at about 5:30 p.m., for various Nebraska points it is authorized to serve.

Roy is authorized to transport general commodities, with exceptions, between Omaha and Norfolk over U. S. Highway 275; and between Columbus and Fremont over U. S. Highway 30, serving all intermediate points. He is authorized also to transport general commodities, with exceptions, from "Norfolk and vicinity to and from Ainsworth, Nebr., and occasionally to and from points in the State of Nebraska at large", with certain restrictions. He operates six tractors, six trailers, and two trucks, and maintains terminals at Omaha, Norfolk, and Fremont. An exhibit offered in evidence shows that Roy received numerous interstate shipments at Omaha in December 1956, and in January 1957, from various carriers for movement to Nebraska points beyond Norfolk, and it transferred such shipments.

to Clark at Norfolk. In 1956, Roy received from various carriers at Omaha numerous interstate shipments destined to Norfolk which were delivered to that point directly by Roy. The witness representing Roy admitted that certain shipments transported to the Young Mens Christian Association in Norfolk have been refused because they had been routed for delivery by Clark.

As here relevant, C.R.I.P. operates over a network of rail lines extending from Chicago, on the east to Denver; on the west via Des Moines, Omaha, and Lincoln, and from Minneapolis-St. Paul, on the north to St. Louis and Kansas City, on the south. In addition to Omaha and Lincoln, it serves certain other points in southeastern Nebraska. It also serves St. Joseph. It renders daily merchandise car service between Chicago, on the one hand, and, on the other, Omaha, Denver, St. Louis, Kansas City, and Minneapolis-St. Paul; between Denver, on the one hand, and, on the other, St. Louis, Kansas City, and Omaha; and between Kansas City and St. Paul. C. N. W. as here material, operates over a system of rail lines extending from Chicago, on the east, to Lander, Wyo., on the west, via Omaha, Norfolk, and Chadron, Nebr., and from Minneapolis-St. Paul, on the north, to Des Moines, and Lincoln, on the south. Its lines also extend to numerous points in southeastern Nebraska, including Superior. Among other things, it operates through less-than-carload merchandise cars daily between Chicago and Omaha, and between Minneapolis-St. Paul and Omaha.

C. B. & Q., operates over a network of rail lines extending from Chicago, on the east to Denver on the west, via Omaha and Lincoln, and between Minneapolis, on the north and St. Louis, Kansas City, and St. Joseph on the south. In addition to Omaha and Lincoln, it serves numerous other points in various areas of Nebraska, including Grand Island. C. B. & Q., offers through less-than-carload

merchandise car service between Chicago on the one hand, and, on the other, Omaha, Kansas City, Minneapolis-St. Paul, and St. Louis; between St. Louis and Kansas City, on the one hand, and, on the other, Omaha and Denver; and between St. Joseph and Omaha.

Missouri Pacific's lines, as here relevant, extend from St. Louis to Omaha, Lincoln, and certain other points in southeastern Nebraska, via St. Joseph and Kansas City. This protestant operates two less-than-carload merchandise cars daily between St. Louis and Omaha; one merchandise car between St. Louis and St. Joseph daily, and at least one daily between Kansas City and Omaha. The above-named rail protestants handle carload as well as less-than-carload traffic between the points they serve, and interchange such traffic with connecting railroads for transportation to and from points between their own lines. They are ready, willing, and able to transport additional traffic. All of the points on the above-named protestants' rail lines pertinent to the instant application are not open and prepay stations.

Union Pacific's lines, as here pertinent, extend from Council Bluffs, Iowa, Omaha, Kansas City, and St. Joseph, on the east to Denver on the west. In addition to Omaha, it serves numerous points in Nebraska, including Lincoln, Grand Island, and North Platte. Although most of the Nebraska points it serves are open stations, some do not have any agent of their own and are served from another station nearby. Union Pacific operates scheduled freight trains between various points, including service between Council Bluffs (Omaha) and Kansas City, between Lincoln and St. Joseph, and between Council Bluffs (Omaha) and Denver. It interchanges traffic with other railroads at various points, including Council Bluffs, Kansas City, and Denver. In connection with other railroads, it participates in merchandise car service between Chicago and

Denver; between St. Louis, on the one hand, and, on the other, Omaha, North Platte, and Denver; St. Louis and Kansas City, and between Minneapolis-St. Paul and Omaha. It also renders merchandise car service on its lines between Denver and Kansas City, and between Denver and Omaha. It transports carload as well as less-than-carload traffic, and can render additional service of this nature.

BRIEFS.

In its brief, applicant argues principally that the free flow of interstate commerce via motor carrier has been obstructed and impeded through the failure and refusal of protestants and other unionized carriers to give the required service; that such obstruction deprives many Nebraska communities of needed interstate transportation service from or to manufacturing and distributing points outside Nebraska; that Omaha business concerns supporting the application are entitled to door-to-door service in order to remain in business on a competitive basis; that a formal complaint is not the only remedy available; that the application is based solely on public convenience and necessity; that the evidence shows there is a real demand and need for the proposed service; that when protestants and other line-haul carriers refuse to provide their respective portion of the through movement, the Commission has no alternative but to authorize another carrier who will perform the required service to enter the field, and that it is fit and able to conduct the motor carrier operations proposed.

In their briefs, protestants assert that the application be denied. They argue principally that applicant has not shown that the existing transportation service between the points involved is inadequate; that it has failed to prove the stockholders of applicant are unable to conduct

interchange operations with existing line-haul carriers; that, if applicant's allegations of refusal to interchange are true, a complaint should be filed by the stockholders with this Commission instead of an application for authority; that motor carriers are not enjoined by part II of the act to follow designated routings; that the matters involved herein are within the exclusive jurisdiction of the NLRB; that if applicant's stockholders are involved in alleged secondary boycott activities on the part of Teamsters, they have an adequate remedy in the courts and before the NLRB. It is contended further that the power to issue certificates granted by Congress to this Commission was never intended to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes, and that grants of authority based on evidence of the sort presented herein would result in two types of carriers, union and nonunion. Rail carriers contend that they should not be confronted with another common carrier competitor operating along their principal routes simply because of the labor differences of several nonunion motor carriers serving various interior Nebraska communities. They also question applicant's fitness and ability to conduct the extensive operations sought.

DISCUSSION AND CONCLUSIONS.

Before discussing the merits of the application the question of jurisdiction raised on brief should be resolved. The common carrier application here was filed under Part II of the Interstate Commerce Act for the issuance of a certificate which, if granted, would authorize applicant to transport general commodities, with exceptions, in interstate or foreign commerce, between various points. Section 206(a) of the Interstate Commerce Act prohibits any common carrier by motor vehicle from operating in interstate or foreign commerce unless and until it holds a cer-

tificate of public convenience and necessity from the Commission. Section 204 of the same act reads, in part, as follows:

"(a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service * * *";

Section 202(a) of the act reads as follows:

"The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission."

Section 10(a) of the Labor Management Relations Act, 1947, usually referred to as the National Labor Relations Act, hereafter called Labor Act, reads in part as follows:

"The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

and under section 10(c) NLRB. can issue an order and notice as set forth in appendix C hereto.

Of the 12 stockholders of applicant, Clark is the only one who has sought relief from NLRB, and is the only one who had employees on strike. The other stockholders have not sought relief from NLRB, do not have employees on strike, and certainly in respect of the application herein, as to them, there can be no valid claim that this Commission is injecting itself into the area of labor relations and collec-

tive bargaining. Such stockholders believe there is need for additional transportation service based principally on the refusal of certain line-haul carriers to interchange traffic with them. In addition to the testimony of the stockholders themselves, evidence was presented by certain public and shipper witnesses on the question of need for the proposed service. The subject matter here for consideration is an application under section 207(a) of the Interstate Commerce Act and disposition of the proceeding requires, among other things a determination of whether the service proposed in the application or any portion thereof is or will be required by the present or future public convenience and necessity, and deciding the issues therein by the Commission does not conflict with the decision in *Garner v. Teamsters Union*, 346 U. S. 485, where it was held that the grievance of a trucking company against picketing by Teamsters (Local 776) was a matter to be decided by NLRB and not by a State tribunal. In that proceeding a State labor board was endeavoring to occupy the same field in which the NLRB is engaged. Where transportation is involved under the Interstate Commerce Act, however, and the duties of common carriers thereunder are involved with respect to the service rendered to the shipping public, it is clear that the Labor Act did not give NLRB exclusive power, particularly where the statute of another regulatory body is violated. *Quaker City Motor P. Co. v. Inter-State Motor Fr. Sys.*, 148 F. Supp. 226. Reference to appendix C hereto (the NLRB order) shows Teamsters are directed to cease and desist from certain secondary boycott activities against Clark "or any other common carrier by motor vehicle in the area" over which Teamsters Local 554 has jurisdiction. In other words, the protection afforded to Clark by the NLRB order against secondary pressures was extended to other motor carriers in the area which the union was attempting to organize.

The fact that NLRB has issued an order in this matter, however, does not preclude the Commission from considering whether additional motor carrier facilities are needed; or other action should be taken under the Interstate Commerce Act because of the interchange difficulties in which certain of applicant's stockholders are involved. The NLRB order directs a union local to cease and desist from certain activities. A Commission order would be directed to an interstate motor carrier or carriers. See *Montgomery Ward & Co. v. Santa Fe Trail Transp. Co.*, 42 M. C. C. 212, discussed elsewhere herein. The examiner concludes that the Commission has jurisdiction properly to consider the transportation matters involved in the instant application.

Before the Commission may grant a certificate of public convenience and necessity under section 207(a), it is necessary to consider, among other things, (1) whether the new operation or service will serve a useful purpose, responsive to a public demand or need; (2) whether this purpose can and will be served as well by existing lines or carriers; and (3) whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation*, 1 M. C. C. 190, 203. Any order authorizing such a certificate would have to include a finding to the effect that there was no existing service in operation between the points or over the area applied for or that such service was inadequate or that existing carriers could not furnish and are not satisfactorily furnishing the service required. *Inland Motor Freight v. United States*, 60 F. Supp. 520. It is clear from the facts in the instant proceeding that this application is not based on the usual evidence presented in proceedings of this kind. Some protesting unionized motor carriers have refused to interchange traffic with

certain stockholders of applicant who are not unionized, and it is applicant's position that this constitutes an inability or unwillingness on the part of existing carriers to provide adequate and reasonable service to the shipping public in the involved territory. Applicant cites a number of cases in its brief to sustain the claim that the unionized line-haul carriers, including protestants, are unable or unwilling to provide service, notably *Meier & Pohlmann Furniture Co. v. Gibbons*, 113 F. Supp. 409, 233 F. 2d 296; *Montgomery Ward and Company, Inc. v. Santa Fe Trail Transp. Co.*, *supra*; and *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M. C. C. 719.

As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with the stockholders named herein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging traffic with a considerable number of the line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D.M.T., and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder has been able to find a motor carrier willing to accept interstate shipments.

Although the shipper evidence relating to interior Nebraska points indicates there have been some delays in transit, principally because shipments have been diverfed

to carriers other than those designated by the consignees, the shipments have been moving through to destination. There is a question, however, what effect this diversion of traffic which has taken place within Nebraska, has on the issue of public convenience and necessity involved herein.

Although Part II of the act does not specifically grant to shippers the right to designate the routes by which their property should be transported by motor common carriers, such carriers are charged with the duty under section 216(b) of the act, to establish, observe and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and it has been held that misrouting is an unreasonable practice under certain conditions. *Eastern Aircraft v. Fred Olson & Son Motor Service Co.*, 47 M. C. C. 363. *Metzner Stove Repair Co. v. Ranft*, 47 M. C. C. 151. In the latter case the shipper had specified a certain interchange carrier but the originating carrier had ignored the routing which resulted in shipments being transported over another route at a higher rate. A consignee who exercises control over shipments is a shipper. *United States v. Metropolitan Lbr. Co.*, 254 Fed. 335. Part I of the act, section 15(8), dealing with the railroads, specifically provides that shipper routings must be observed, and section 15(9) gives a cause of action to the rail carrier who suffers a loss of traffic by misrouting. The examiner is informed on protestants' briefs that there is presently pending in Congress a bill which would so amend Part II of the act as to specifically provide, as is now provided in Part I of the act, that a motor carrier subject to Part II must observe and follow shippers' specified routings. If legislation to this effect is passed, such a statute should help correct the misrouting abuses revealed herein. Presently, however, the carriers injured by misrouting can file a complaint, where it could be determined whether the practices

alleged are just and reasonable. In any event, since the Commission has not had an opportunity to pass on these misrouting practices as they affect the particular stockholders involved, it is illogical to assume that the Commission can do nothing by way of a complaint proceeding. If nothing can be done in that manner, then other steps could be taken. In the meantime, however, considering the circumstances involved, and in the absence of specific legislation under Part II regarding misrouting, an extensive grant of operating rights between Omaha and Lincoln, on the one hand, and, on the other, Chicago, Denver, St. Louis, St. Joseph, Minneapolis and Des Moines would not be justified, particularly since the diversions or mis routings have taken place principally within Nebraska.

In regard to the shipper evidence relating to Lincoln, the facts show that the existing carriers generally are giving good service to the involved retail stores, and there is no substantial basis to authorize additional motor carrier service to or from that point.

As to Omaha, the evidence shows, with respect to the air-conditioning contractor, that Bos has been making deliveries direct to consignee's place of business since about October 1, 1956, and that picketing at the contractor's place of business had ceased. Similarly, after January 28, 1957, the line-haul carriers resumed pickup and delivery service at the manufacturer of frames for upholstered furniture when the Upholsterers' Union withdrew its charges of unfair labor practices. Thus, as to these business establishments no need has been shown for the additional service proposed.

In regard to the warehouse operator, the evidence shows its premises were still picketed by Teamsters. In the *Meier & Pohlmann* case, *supra*, a furniture company in St. Louis was involved in a strike of its workers which belonged to a union certified by NLRB. The strikers set up a picket

line. Thereafter, pickup and delivery service by carriers practically ceased. The motor carrier defendants there claimed that they were excused from furnishing pickup and delivery service by their impracticable delivery tariff. This tariff in substance stated that there was nothing therein which would require the carrier to perform pickup or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of "any riot, strike, picketing or other labor disturbance." The Court pointed out that it was not concerned with the question of the validity of the tariff but only with the construction and interpretation thereof. After an appraisal of the evidence, the court concluded that the defendant carriers were excused from performing the pickup and delivery service to which plaintiff therein claimed it was entitled. In making this determination the court stated: "Because of the foregoing conclusion we do not reach the question of whether a proper construction of the impracticable operation tariff would excuse performance by the carriers if only peaceful picketing had been present or had been involved." The facts in that case had indicated there was some violence and peace disturbance during the existence of the picketing. The action therein included a request for a permanent injunction and it was indicated that under the Norris-LaGuardia Act it was necessary to show, among other things, that unlawful acts had been threatened and would be committed unless restrained or that such acts had been committed and would be continued unless restrained.

In the instant proceeding while the facts indicate that the warehouse operator in Omaha has been the subject of organizational or recognition picketing and there has been no strike of its employees, it is apparent that a labor dispute is in progress in which Teamsters seek to have the employer pay established wage rates. In *Garner v.*

Teamsters, supra, where Teamsters had resorted to organizational picketing to induce a storage and transfer company in Pennsylvania to join the union and "gain union wages, hours, and working conditions", the Supreme Court concluded that Teamsters were subject to being summoned before the NLRB to justify their conduct, and that on the basis of the allegations the Pennsylvania storage company could have presented its grievance to the NLRB. In that case picketing was orderly and peaceful, but drivers for other carriers refused to cross the picket line. A motor common carrier of freight, in interstate or foreign commerce, has certain duties and responsibilities toward the public. It is under a duty to shippers to furnish service under its tariffs to the limit of its capacity to do so upon reasonable demand. *Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co.*, 215 F. 2d 126. Whether the line-haul carriers in the instant proceeding are violating their common carrier duty in not performing pickup and delivery service is properly the subject of a complaint proceeding. In *Montgomery Ward Co., Inc. v. Santa Fe Trail Transp. Co.*, *supra*, a complaint proceeding, it was found that refusal by certain motor carriers to make pickups and deliveries was unlawful and in violation of section 216 of the act. In that proceeding, however, picketing was resorted to for the sole purpose of forcing a shipper to patronize a particular carrier. Montgomery Ward in Kansas City had terminated its contract with a local transfer company and entered into a new one with Railway Express for transportation of local mail and miscellaneous freight. The drivers of the express company were members of one union and the drivers of the transfer company were members of Teamsters who established a picket line simply because the transfer company lost its contract. The warehouse operator in the instant proceeding has taken no action before this Commission in the way of a complaint, and

evidently has not requested any action by NLRB. In addition to these regulatory agencies, it has recourse to the courts for an injunction. See *Quaker City Motor P. Co. v. Inter-State Motor Fr. Sys.*, *supra*. Its traffic is getting through to its warehouses by railroad, and it also receives some direct delivery service by motor carriers of specific commodities. In the circumstances, the evidence with respect to proposed service to and from Omaha does not justify any grant of additional authority.

• As previously indicated, there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that the real parties in interest who are aggrieved by this practice should file a complaint with this Commission under Part II of the act. In any event, since no complaint has been filed by any of applicant's stockholders with this agency, the Commission has not had an opportunity to test the effectiveness of that procedure. Certainly it cannot be assumed that the Commission's procedure thereunder would be ineffectual. Although applicant cites the *Planters Nut* case, *supra*, to sustain its argument that additional motor carrier authority is needed to correct the situation, it should be borne in mind that that was a complaint case and the Commission issued an order requiring certain specified carriers to cease and desist from certain interchange practices found to be unlawful. In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and, if a certificate is granted on the evidence herein those protesting carriers who have been continuing to interchange normally would be injured along with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to

the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions of the routes involved and the shipments are moving through to destinations.

The examiner concludes that the application should be denied. In view of this conclusion, it is not deemed necessary to discuss the question of applicant's fitness and ability to conduct the proposed operations. Also, in view of this conclusion the examiner does not deem it necessary to discuss the necessity of the involved stockholders seeking approval under section 5 of the act to control applicant through ownership of stock or otherwise. Furthermore, since denial of the application is recommended it is not necessary to consider what effect a grant of operating rights would have on certain of applicant's stockholders who operate under the second proviso of section 206a of the act and are presently permitted to handle interstate traffic solely within Nebraska without a certificate from this Commission.

FINDINGS.

The examiner finds that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Donald R. Sutherland, Examiner.

(Signature) Donald R. Sutherland.

No. MC-116067

Appendix A (to Sutherland Report).

Nebraska Short Line Carriers, Inc.

DESCRIPTION OF AUTHORITY SOUGHT.

Authority to operate as a common carrier, over regular routes, transporting: General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30 to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S.

Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph, Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

Appendix B (to Sutherland Report).**APPLICANT'S COMMON CARRIER TEMPORARY AUTHORITY IN
No. MC-116067 (SUB-NO. 1) TA.**

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over regular routes.

Between Omaha, Nebr., and Chicago, Ill., with inter-line privilege at Omaha:

From Omaha over U. S. Highway 6 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route.

Service is not authorized at intermediate points.

Between Omaha, Nebr., and St. Louis, Mo., with inter-line privilege at Omaha:

From Omaha over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, and thence over U. S. Highway 40 to St. Louis, and return over the same route.

Service is authorized at the intermediate point of Kansas City, Mo., except on shipments moving to or from St. Louis.

Appendix C (to Sutherland Report).

COPY OF NATIONAL LABOR RELATIONS BOARD ORDER
AND NOTICE.

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 554, AFL-CIO, its officers, representatives, agent, successors, and assigns, shall:

1. Cease and desist from:

(a). Engaging in, or inducing or encouraging the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, or (2) to force or require Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, to recognize or bargain with Respondent as the collective bargaining representative of their employees, respectively, unless and until the Respondent has been certified as the representative of such employees in accordance with the provisions of Section 9 of the National Labor Relations Act;

(b) Engaging in any or all of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Forthwith notify all its members who are employed by employers other than Clark Bros. Transfer Company and Coffey's Transfer Company, and all employees of said employers who are represented by it, that it has no objection to their transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company. Such notice shall be in addition to that conveyed by the posting of the notices specified in paragraph (b), below;

(b) Post at its business office at Omaha, Nebr., copies of the notice attached hereto as an Appendix¹¹.

11. In the event that this Order is enforced by a decree of a United States Court of Appeals, this notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

**NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, GENERAL DRIVERS
AND HELPERS LOCAL 554, AFL-CIO.**

PURSUANT TO

A DECISION AND ORDER.

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which we have jurisdiction, or (2) to force or require Clark Bros. Transfer Company or Coffey's Transfer Company, or any common carrier by motor vehicle in the area over which we have jurisdiction to recognize or bargain with the undersigned union as the representative of their employees unless and until certified by the National Labor Relations Board.

WE WILL NOT engage in any of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

WE HAVE NO OBJECTION to the action of the employees of any employer other than Clark Bros. Transfer Com-

pany and Coffey's Transfer Company in transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company; and we will give specific notice to that effect to all our members who are employed by any such employer and to all other employees of such employers who are represented by us.

INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, GENERAL
DRIVERS AND HELPERS LOCAL No. 554,
AFL-CIO.

By
(Representative) (Title)

Dated

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent's official representative shall also sign copies of the said notice which the Regional Director shall submit for posting, the employers willing, at the premises of Clark Bros. Transfer Company and Coffey's Transfer Company (if it resumes operations), and at the Omaha premises of the other

employers named in footnote 38 of the Intermediate Report¹²;

(c) Notify the Regional Director for the Seventeenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., December 26, 1956.

BOYD LEEDOM,

Chairman,

PHILIP RAY RODGERS,

Member,

STEPHEN S. BEAN,

Member,

(SEAL)

NATIONAL LABOR RELATIONS BOARD.

Recommended by Donald R. Sutherland,
Examiner,

(Signature) DONALD R. SUTHERLAND.

12. There shall be inserted in the caption of said notices, following the name of the Respondent, the words "And to All Employees of" followed by the name of the employer at whose premises the said notice is to be posted.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on the
..... day of A.D. 1957.

No. MC-116067.

NEBRASKA SHORT LINE CARRIERS, INC. COMMON CARRIER
APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

IT IS ORDERED, That the said application be, and it is hereby, denied.

AND IT IS FURTHER ORDERED, That this order shall be effective on

By the Commission, division 1.

(SEAL)

HAROLD D. MCCOY,
Secretary.

APPENDIX D.

No. MC-116067 (Sub-No. 2)

NEBRASKA SHORT LINE CARRIERS, INC.

COMMON CARRIER APPLICATION.

REPORT AND ORDER.

RECOMMENDED BY MICHAEL B. DRISCOLL, *Examiner*.

Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., by application filed January 10, 1957, as amended, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities (except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, those requiring special equipment, and stone, cut or uncut, finished or in the rough), between Omaha, Nebr., on the one hand, and, on the other, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

Under appropriate orders, the application was heard at Omaha, April 4-5, 9-12, and 15-17, 1957. The application is opposed by numerous rail carriers, by a relatively large number of motor carriers, and by General Drivers and Helpers Union, Local 554, of Omaha, affiliated to International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, A. F. L.-C. I. O.

Certain motor carriers are referred to herein by abbreviated names. Those names and the corresponding full names will be shown below. Unless otherwise shown herein, all those are motor common carriers of general commodities, with more or less standard exceptions, and all operate over regular routes.

<u>Abbreviated Name:</u>	<u>Name of Carrier:</u>
Romans	John Jack Romans
Clark	Fred L. and Walter F. Clark
Abler	Abler Transfer, Inc.
Burlington Truck	Burlington Truck Lines
Santa Fe Trail	The Santa Fe Trail Transportation Company
McKay	C. C. and Earl R. McKay
Lyon	Royal F. Lyon

All rulings on appearances, motions, amendments, and objections have been reviewed and further considered, and they are hereby affirmed.

All evidence has been studied and weighed. No one would be helped and no good nor useful regulatory purpose would be served by writing down all that voluminous evidence. Instead of all that, the intermediate or ultimate facts will be stated in most instances; and, from those facts, first preliminary and then ultimate conclusions will be drawn. For reference purposes, numbered divisions will be used.

1. Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through or to that centrally located city.

2. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union. Those

Teamster contracts almost invariably contain the so-called hot cargo provisions, which read:

"It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs or lockouts exist.

The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement.

The Union shall give the Employer notice of all strikes and/or the intent of the Union to call a strike of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the pos-

session of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

The insistence by any Employer that his employee handle unfair goods or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any need of the Union to go through the grievance procedure herein."

3. Differing from those larger trunkline carriers, are a number of small, or relatively small, eastern Nebraska motor carriers, which are not unionized, and which use Omaha as a principal or important interchange point with the larger unionized carriers. Some may also use Grand Island or Lincoln, Nebr., Sioux City, Iowa, or possibly other places as points of interchange, but all or practically all use, and logically must use, Omaha for much or most of their jointline traffic.

4. As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in those eastern Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Ahler, were not approached until early 1956. It is obvious from this record that the Union was not very successful; that, in most cases the employees did not respond; and that in every instance the carriers were more than reluctant to accept unionization.

5. The Clark situation is somewhat different from that of other eastern Nebraska carriers, so that it will later be considered separately.

6. Having no satisfactory success in the eastern Nebraska field, the Union apparently and very probably

started at the other end and began to work through the unionized carriers and put the pressure indirect' on the eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln, and Grand Island.

7. While some Omaha trunkline carriers did not freely admit that their interchange practices after May 1956, had been materially different from earlier practices, some others freely admitted they had not been able to interchange with eastern Nebraska carriers in the same free and open way they interchanged prior to May 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May 1956, a deterioration in interchange relationships and a rise in interchange difficulties.

8. The conclusions of Paragraph 7 are heavily confirmed by the testimony and exhibits of a number of the eastern Nebraska carriers. Example after example was recited with convincing sincerity, and surely no one could seriously contend that the firm declarations of these carriers were not well founded upon actual experience. The conclusions of Paragraph 7 must therefore be accepted as correct and conservative.

9. It should be stated that the attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe Trail, accepted almost all traffic offered. But even those carriers

did not maintain the same free and open interchange practices in effect before May 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not provide normally acceptable service for much or most of the traffic which these eastern Nebraska carriers would normally have handled.

10. The record shows beyond any reasonable doubt that, so far as those eastern carriers were involved, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May 1956. And there could be no reasonable doubt that, as a direct result, those Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers. A few examples of the effects will suffice. In 1955, about 20 percent of McKay's traffic was interstate, while now probably not over 10 percent is interstate. Abler's gross revenue fell about \$70,000 in 1956, and its interstate traffic fell from 60 percent of the total traffic to 40 percent. Incidentally, Abler used to have an appreciable amount of interstate traffic through Sioux City, Iowa, but has given up that gateway temporarily, assertedly because of Union pressure. Romans' February 1957 gross revenue was \$3,000 less than its February 1956 revenue. Lyon's total traffic used to include from 18 to 20 percent interstate, but now it is almost wholly intrastate.

11. Faced with that problem, some of the eastern Nebraska carriers got together and formed applicant corporation. No point would be made by reciting the preliminary or intermediate steps in that transaction. The principal theory of the corporation is that, as a carrier based at

Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond.

12. As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation.

13. Applicant was originally organized as a Nebraska Corporation June 14, 1956, and was reorganized January 7, 1957. Its principal office is at Lincoln. Its authorized stock consists of 1,000 shares of common and 5,000 shares of preferred stock, all shares having a par value of \$100 each. Outstanding stock consists of one share of preferred and 375.5 shares of common stock. With a minor exception of a half share of common, all outstanding stock is held by eastern Nebraska carriers, no one of which holds over 51.5 shares. There are now 12 stockholders. There are three officers and those, with two other persons, form the present board of directors. All those officers and directors are eastern Nebraska carriers or officials of such carriers.

14. The corporation was formed for the purpose of operating as a motor common carrier of general commodities, with exceptions. Applicant first sought, and obtained, certain temporary authority. That authority was granted in No. MC-116067 (Sub-No. 1) by order of the Commission, division 1, entered December 4, 1956. A joint petition in opposition thereto was filed, by four motor carriers, and that petition was denied by order of the Commission, entered February 25, 1957. In the meanwhile, compliance by applicant having been made, the Commission, by telegram of January 3, 1957, authorized applicant to operate

under that authority until June 30, 1957. That authority covers general commodities, with exceptions, over specified routes, between Omaha and Chicago, with interline service at Omaha and with no service at intermediate points, and between Omaha and St. Louis, with interline service at Omaha and with service at the intermediate point of Kansas City, Mo., except that the Kansas City authorization does not include shipments moving to or from St. Louis. While operations under that authority could have been commenced January 3, 1957, they were not commenced until shortly after March 1, 1957. The explanation of that delay is that, for reasons not disclosed, applicant's counsel advised against operations prior to that time. While there was no showing of traffic volume or number of trips, the record as a whole shows rather conclusively that operations under that authority have been at least rather substantial.

15. Under an application filed June 22, 1956, in No. MC-116067, applicant is seeking a certificate for general commodities, with exceptions, over a number of specified routes, principally between Denver, Colo., and Chicago, Ill., via Omaha, with service at all intermediate points. Hearing on that application was closed February 25, 1957. It should be noted that, as to points and commodities, the instant application would include everything in that application. The only material difference would be that this is for irregular route authority while that is for regular route authority.

16. Applicant has employed an able and experienced general manager, and it is more or less leaving it up to him to plan, institute, and maintain operations and services under this relatively broad application. No detailed plan was disclosed. Applicant asserts it would be a simple matter to provide the proposed service. As to possible backhaul traffic, it was admitted that this would be something of a problem. One statement was that, if service

were asked for a shipment from a distant outlying point to Omaha, an attempt would be made to solicit a load from Omaha to that outlying point or to some point near it. The appearances and indications are that some reliance would be placed on exempt commodities for backhaul. A statement on that subject was made to the effect that, if a load were moved from Omaha to Santa Fe, N. Mex., for example, it might be necessary to move the unloaded truck to a Rio Grande Valley point or to southern California for a return load. While no finding need be made on this subject, it seems to be a fair statement to say that an operation based on Omaha and covering so many States would, particularly as to less-than-truckload traffic, present a lot of difficult operational and service problems.

17. Although it states it might buy equipment if that were later deemed necessary, applicant has so far used only leased equipment. All appearances are that it would continue the use of leased equipment into the indefinite future. A number of eastern Nebraska carriers have declared their readiness and willingness to lease certain other equipment to applicant. Equipment is also available for leasing from other sources.

18. Applicant now has terminal facilities at Omaha and Chicago and it apparently has such facilities at Kansas City, Mo. Attempts are being made to obtain such facilities at St. Louis, Mo. Not much was said about future terminals.

19. Applicant's present employees consist of a general manager and an office employee at Omaha and a solicitor at Kansas City. Accounts are looked after on a part-time basis by a certified public accountant. There are no drivers carried on the rolls, because the lessors of equipment either drive their leased equipment or provide a driver with their equipment.

20. Applicant submitted a balance sheet as of March 31, 1957. That shows total assets of \$29,340.46 and current assets of \$26,213.06. Current liabilities were \$3,514.90. The capital stock account was \$37,550, and the earning deficit was \$11,724.44. That left a net worth of \$25,825.56. An operating statement for the period from June 14, 1956, through March 31, 1957, shows revenue of \$5,220.06 and expenses of \$16,944.50 and a deficit of \$11,724.44. Applicant explains that operations were not started until about March 1, 1957, and that expenses were sharply increased by expenditures for organizing the corporation and preparing it for operations. It contends that, with the authority sought, it could wipe out the deficit and get on a profitable basis. It also explains that additional funds could be raised by selling more stock.

21. A number of possible technical difficulties were pointed out at the hearing. One theory was that, since applicant's stockholders are owners or part owners of other motor carriers, section 5 of the act might be involved. Another theory advanced was that some stockholder carriers operate under registration of Nebraska certificates and that their stock holdings might have the effect of placing themselves in position where they would have to choose between their registration right and their right to hold stock in applicant corporation. Still another difficulty was argued from the fact that, if successful under both pending applications, applicant would have to the extent of duplication both regular and irregular route authority. Applicant declares that, if found necessary, section 5 applications would be filed. These asserted difficulties are technical in nature. They should not be considered as reasons for denying this application. If applicant is otherwise found fit and able and if it is found that public convenience and necessity require any part of this proposed operation, these technical matters should then

be studied and applicant should then be given an opportunity to overcome any obstacles that may arise from those matters.

22. The principal and most important evidence in support of this application comes from representatives of the 12 stockholders of applicant, which are eastern Nebraska carriers. From an earlier study of that evidence, along with all other evidence, it has already been concluded that, as a result of Union pressure on trunkline carriers, all those 12 carriers suffered some inconvenience and some damage from the action, inaction, or failure of those trunkline carriers in their interchange practices with those eastern Nebraska carriers.

23. When the evidence of those 12 carrier representatives is carefully and fairly examined, it must be said that not one of them complained of interchange conditions or of connecting line services in existence prior to the rise of Union pressure in early 1956. In other words, not one of them showed or even alleged that when conditions were normal they then had a need for a new or additional connecting line at Omaha. All their complaints are, in fact, bottomed on the rise of Union pressure. On the contrary, some of the leading figures in this enterprise admitted that, up to May 1956, everything in the way of interchange practices and connecting line services had been all right. For example, Lyon, the treasurer and a director of applicant, admitted his business was normal before February 8, 1956. Leonard Abler, a director, admitted his business had been normal up to May 1956. Romans, president and director of applicant and the principal carrier witness therefor, specifically admitted that his connecting line arrangements and practices had been satisfactory up to May 7, 1956. The only logical, reasonable, and fair conclusion from all that evidence is that, so far as those carriers are of concern, everything had been all right up to early 1956 and would

be all right again if the interchange practices and carrier services of trunkline carriers went back to their normal standards maintained before these Union difficulties arose.

24. As already noted, the Clark situation is somewhat different from that of other eastern Nebraska carriers. Clark started its business in 1938, under authority obtained from the Nebraska regulatory agency, and that authority was subsequently registered with this Commission. As a result of a proceeding before this Commission, a certificate, in lieu of registration, was issued to Clark on April 4, 1957. Clark's system of routes lies in northeastern Nebraska. Those routes extend from Lincoln, Omaha, and South Sioux City, Nebr., to such Nebraska points as Fremont, Columbus, Grand Island, Norfolk, Butte, and Ainsworth. It has terminals at Omaha and Norfolk. Like the other eastern Nebraska carriers, its difficulties arose from labor causes, but they arose earlier. After some labor negotiations, which need not be recited, four driver employees left the Clark organization at Omaha on September 14, 1955, and picketing of the Clark Omaha terminal immediately followed. As a result, interchange business with Omaha trunkline carriers fell to almost nothing. Clark's attorneys soon thereafter took that problem up with National Labor Relations Board. There were several resulting proceedings before that Board and before Federal Courts. Despite all that, these matters have never been completely settled, at least to the satisfaction of Clark. A contempt citation is still pending before the Court, and the Clark Omaha terminal is still being picketed. The interchange situation was rather acute until about July 30, 1956, when some improvement began to develop. Further improvement developed after November 1956. But the situation was never completely normal, not even up to the opening day of this hearing. There would be no point in detailing all the legal steps taken by Clark or on behalf of Clark, because those

controversies could not be fairly nor intelligently resolved here. The fact here is that the troubles of Clark arose from labor relations, and that the damage to Clark has been very severe. Its gross revenue fell from \$262,000 in 1954 to about \$217,000 in 1956, and its interstate traffic fell from 30 percent of its total traffic in 1954 to about four percent in 1956. But here again there is no showing nor even an allegation that the interchange practices or services of Omaha trunkline carriers were inadequate or even unsatisfactory prior to September 14, 1955. A logical, reasonable, and fair conclusion is that, if the labor difficulties complained of had never arisen, there would have been no complaint and no just basis for a complaint against Clark's connecting carriers.

25. In fairness to those eastern Nebraska carriers, it should be said that a few of them advanced the idea that, even if all labor problems were resolved and even if all truckline interchange practices went back to normal, there could be no assurance that labor problems might not arise again. While there is little history of past labor relations, the Abler witness declared his company had experienced similar difficulties three times before. In other words, the theory is that applicant could be used as a safeguard against the effects of possible labor difficulties in the future.

26. As further support for this application, applicant presented representatives of a number of possible users of the proposed service. Three of those possible users have been experiencing labor difficulties right at their own places of business. For that reason, their problems will be considered first.

27. Two related companies, using the same Omaha plant, will be referred to here as the Chardon Companies. Together, they manufacture a number of furniture items. Sales are made at numerous points in 29 States, most of

which are included in this application. Raw materials and supplies are received from one to several points each in 23 States, all of which are included in this application. The yearly volume averages 3 million pounds out and .3.5 million pounds in. Most of the outbound and much of the inbound traffic is controlled by the Chardon Companies. Truck service is used for 75 percent of the outbound and for 40 to 50 percent of the inbound traffic. It is admitted that service was all right until October 18, 1956, when a relatively small number of its 70 to 75 employees failed to show up and apparently went out on a strike. Shortly afterward, a picket line was formed around the plant. There were a few incidents of roughness, such as air being let out of workers' automobile tires and a flare being thrown through the window of the plant office. The police department could not determine whether the flare had been lighted. It should be noted that this labor difficulty was with the upholsters' union. As a result of that difficulty, the Chardon Companies encountered trouble in getting trucking service for its in and out freight. In the meanwhile, the labor trouble has disappeared, and normal service has been available since January 28, 1957. There is no showing nor contention that the service normally available is inadequate or would be for the future. The Chardon Companies have been using applicant's temporary service, along with the services of other carriers. In support of this application, they say that it would be a benefit to them to have many lines serving their plant and that, in case of more labor trouble, applicant's service would be very useful.

28. Ford Storage & Moving Company and Ford Brothers Van and Storage Company are family corporations, controlled by the same persons. Their problems will be considered together. They own two warehouses at Omaha and one warehouse at Council Bluffs, Iowa. Their

problems exist only at Omaha. They own some trucks and do local cartage work for the public, in and around Omaha. One principal function of these companies is to provide storage for all classes of merchandise, except such items as require cold storage. In connection with that important part of their business, they normally have a heavy movement of freight both in and out. From 1952 through 1956, the inbound volume ranged from the equivalent of 575 to 779 carloads. Indications are that the outbound volume is relatively large but substantially smaller than the inbound volume. Representative origins of inbound traffic are Chicago, Ill. Durham, N. C., Cincinnati, Ohio, Sioux Falls, S. Dak., and Beloit, Wis. Destinations of outbound traffic are principally in Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado. On inbound traffic, rail service has always been heavily used, but there has been a growing tendency toward truck service. By early 1956, about 60 percent of the volume was coming in by truck. On outbound traffic, truck service is even more extensively used. Normally, the Ford Companies control outbound and the shippers control inbound traffic. These companies have never been unionized; they do not wish to be unionized; and they have never taken their problems up with National Labor Relations Board. Everything in transportation was all right here until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of this hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses and some apparently would not do busi-

ness with these companies. For about a month, during the early days of the picket line, even the train crews declined to serve the warehouses. In that state of emergency, the Ford Companies made arrangements to rely more extensively upon rail service, particularly into Omaha. That is not an ideal solution, and it is only a partial solution of the problem. In addition to the inconvenience and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All those transportation troubles came directly or indirectly from labor difficulties. The Ford Companies admit that their service situation prior to May 1956 was adequate and satisfactory. They support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored, they would still favor applicant's service, their theory of support being that service might be interrupted again in the future.

29. The Broyhill Company has a plant at Dakota City, Nebr., six miles south of Sioux City, Iowa, where it manufactures farm equipment. It sells at numerous points in 43 States, including most of those included in this application. Its gross sales ran between seven and eight hundred thousand in 1956, and greater sales are anticipated in 1957. Raw materials come from a number of points spread throughout 20 States. Rail service is used rather extensively on the bulkier inbound commodities but far less extensively on the outbound traffic. About 60 percent of the out traffic moves in truckload lots. About 80 percent of the outbound traffic is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of a steel workers union went on strike and set up a picket line. Negotiations between Broyhill and the Union have been going on since sometime before the strike was called. As a result of the picket line, there has been no pickup

nor delivery service at the plant since the line appeared. Broyhill admits that it had no transportation problems prior to March 14, 1957, and that its service had been generally satisfactory. It nevertheless supports this application, upon the theory that there could be no guarantee that it would not have another strike.

30. Howard Huff has his place of business at Ord, Nebr., and sells farm machinery in Valley County, Nebr. His principal origin is Hopkins, Minn., but he also receives machines from Chicago, Rock Island, and Moline, Ill. Parts are received from those points, as well as from Kansas City, Mo. Business has been below normal for two years, but in normal times he receives from two to three full loads of machinery yearly and receives parts about twice monthly. He pays freight charges and ordinarily designates routing, although he admits that shippers sometimes do not follow his directions. He complains that, since May 1956, he has had some transportation difficulties. One complaint is that delays have occurred; another is that, contrary to his preference, rail service has been used from Omaha to Ord; and another is that, because of misrouting, excess charges have been applied. He prefers that all his traffic be moved from Omaha to Ord by Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

31. Richard Rowbal, or Ord, sells and erects Quonset buildings in nine Nebraska counties centered on Ord. His principal traffic comes from Detroit, and about 95 percent of it is normally handled by truck carriers. He pays freight charges and ordinarily designates routing beyond Omaha, and his preference is for delivery by Romans. He complains of delays, of the fact that excess charges have been applied in some instances, and of the fact that, contrary to his wishes, deliveries have been made by rail

carriers or by motor carriers other than Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

30. Wheeler Lumber, Bridge & Supply Company has a warehouse at Norfolk, Nebr. It receives raw materials from a number of points in the Midwest and East and ships manufactured products, such as snow fences and corn cribs, largely to Iowa, to some extent to Kansas, Wyoming, and South Dakota, and occasionally to Minnesota. With the exception of South Dakota, practically all outbound traffic goes by truck, and from 75 to 80 percent of the inbound traffic moves by truck. Routing is controlled by Wheeler. On inbound traffic, the practice apparently has been to let shippers select originating carriers but to instruct them to route care of Clark at Omaha. Clark and Abler have been the principal outbound carriers, but from five to six other Norfolk carriers have also been used to some extent. During most of 1955, routing preferences were followed and service was generally satisfactory. Apparently because of labor problems of eastern Nebraska carriers, particularly those of Clark, service has not been satisfactory since late 1955. Complaint was made of delays and of the fact that some shipments came by rail instead of by truck. It was admitted that at least one shipper declined to follow routings prescribed by Wheeler. It supports this application upon the theory that service by applicant in and out of Omaha would enable it to follow its preference in using the Clark service between Omaha and Norfolk.

31. Evidence in opposition to the application was submitted by ten rail carriers, three of which serve Omaha. That evidence tends to show that rail carriers offer and provide standard rail service from and to Omaha in connection with all classes of traffic moving from or to prin-

principal points throughout the territory of this application. Rail carriers are normally unionized throughout their various classes of employees.

32. About 29 motor common carriers submitted evidence in opposition to the application. All these are authorized to transport general commodities, with exceptions, and to operate principally or entirely over regular routes. At least 11 of those are authorized to serve Omaha. Those 11 include most of the principal motor common carriers at Omaha, such as Watson Bros. Transportation Co., Inc., Union Freightways, Navajo Freight Lines, Inc., The Santa Fe Trail Transportation Company, Prucka Transportation, Inc., and Independent Truckers, Inc. Most of the carriers serving Omaha have terminals there, and many of those are large carriers, operating large, or relatively large, fleets of equipment. Most of those carriers admit some difficulties in handling jointline freight with eastern Nebraska carriers, but all of them insist that, if conditions were normal, they could and would provide good interchange service and good highway service. All of them declare that, except for conditions not due to their initiative nor desire, they have been ready, able, and willing to provide service for all traffic offered by shippers or connecting carriers. For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers. It was explained that, where picket lines exist, there might still be difficulties in interchanging traffic in the usual and normal methods of interchange. All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline car-

riers will strive to restore to normal their carrier relationships and interchange practices at Omaha.

33. All the evidence submitted by carriers in opposition has been studied and weighed. The evidence for rail carriers shows that standard, normal rail service is available at Omaha and that rail carriers are ready and able to provide service for all traffic offered. While no serious attempts were made to show that rail service, as such, had been or would be inadequate, the trend of the testimony is to the effect that a sufficiency of motor service is and would be needed from and to Omaha. Actually, the problem here is not based on rail service but is based only on motor service. Rail service can therefore be dismissed from the problem.

34. The trunkline motor carriers, as a whole, have always been willing to provide service from and to Omaha, for traffic originating at or destined to Omaha, as well as for traffic received from or delivered to connecting lines at Omaha. They have also had the ability to provide a sufficiency of service of a quantity and quality, which, if freely and fully available, could have and would have met all the reasonable and well-founded transportation requirements for motor service asserted on this record. Were it not for the effects of union pressure upon these carriers, there would have been no material problem to complain of and there would be no problem here to consider. No matter how this problem is viewed, it has but one origin—labor pressure. If the labor effects were removed from this problem, no problem of any appreciable substance would remain. In that situation, the question is whether a grant of authority should be made to meet and overcome the effects of labor difficulties.

35. In these circumstances, the conclusion is that the application should be entirely denied. Most of the Omaha trunkline carriers have heavy investments in equipment and facilities and have large or relatively large employ-

ment rolls. Everybody knows that labor unions are not like Boy Scout organizations and that labor strikes or other labor difficulties can have seriously damaging or even disastrous effects upon a business and its employees. For example, one carrier in opposition has had a labor problem at its Minneapolis, Minn., terminal since April 21, 1952, and has not provided any direct service at that important terminal point since September 15, 1952. With those important factors influencing their judgment, and in view of the labor contracts they had signed, it was not illogical nor unbusinesslike to more or less go along with their union or at least not to get in trouble with it. As a matter of fact, many of the carriers were advised by a labor affairs consultant. There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just about what any reasonable and prudent business man would have done in the face of these union activities.

36.—Even though one of the stated objects of the national transportation policy is to encourage fair wages and equitable working conditions, the Commission has been given no power to settle labor problems or even to influence them.

37.—It is obvious that it would be unwise to attempt to use the certificate provisions of the act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union. In fact, that action could not be justified by anything in the act.

38.—The trunkline carriers have union contracts. The eastern Nebraska carriers are for the most part small or relatively small business men. Most of them are obviously opposed to unionization of their business. Their Commission has no authority nor means of solving that problem. If, as some eastern Nebraska carriers imply, the National Labor Relations Board does not offer a solution to that problem, then it obviously is a problem that only the Legis-

lative Branch of the Federal Government could solve. Certainly, this Commission is in no position to solve it.

39.—The principle recommended for application to this particular proceeding can be stated in this way: To the extent that the interchange and service defects and inadequacies complained of have been actually due to labor difficulties, and if, as to those difficulties, the carriers immediately affected have exercised such diligence and prudence as would normally be exercised by a business man faced with such difficulties, then, and to that extent, their services and interchange practices will not be considered inadequate for public convenience and necessity purposes.

40.—When that principle is applied here, it must be found that, so far as labor difficulties have affected interchange practices and services, the trunkline carriers are entitled to a protective finding.

41.—When that conclusion is made, there is nothing much left upon which a finding of public necessity could be based. Denial of the application must therefore be recommended.

42.—In view of that conclusion, there is no necessity of recommending a finding on the subjects of fitness and ability.

43.—Nothing said here is intended in any way to affect the application pending for authority over regular routes.

44.—The examiner finds that applicant herein has not proved that public convenience and necessity require the operation for which authority is sought and that consequently this application should be denied.

In view of the findings, the examiner recommends that the appended order be entered.

By Michael B. Driscoll, Examiner.

(Signature) MICHAEL B. DRISCOLL.

Recommended by Michael B. Driscoll,
Examiner.

(Signature) MICHAEL B. DRISCOLL.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on the
day of _____ A. D. 1957.

No. MC-116067 (Sub-No. 2).

NEBRASKA SHORT LINE CARRIERS, INC. COMMON CARRIER
APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

(Seal)

HAROLD D. MCCOY,
Secretary.

APPENDIX E.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

Ross M. Madden, Regional Director
of the Thirteenth Region of the
National Labor Relations Board,
for and on behalf of the National
Labor Relations Board,

Petitioner,

vs.

Meat and Highway Drivers, Dock-
men, Helpers and Miscellaneous
Truck Terminal Employees Local
Union No. 710, International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen and
Helpers of America,

Respondent.

Civil No. 61 C 960.

PETITION FOR INJUNCTION UNDER SECTION 10
(1) OF THE NATIONAL LABOR RELATIONS ACT,
AS AMENDED.

*To the Honorable, the Judges of the United States District
Court for the Northern District of Illinois:*

Comes now Ross M. Madden, Regional Director of the
Thirteenth Region of the National Labor Relations Board
(herein called the Board), and petitions this Court for and
on behalf of the Board, pursuant to Section 10 (1) of the
National Labor Relations Act, as amended (61 Stat. 149;
73 Stat. 544; 29 U. S. C. Sec. 160 (1); herein called the Act),
for appropriate injunctive relief pending the final disposi-
tion of the matters involved herein pending before the

Board on charges alleging that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i) and (ii), subparagraphs (A), (B), and (D) of the Act. In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Thirteenth Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10 (1) of the Act.

3. (a) On or about June 1, 1961, Wilson & Co. (herein called Wilson), pursuant to provisions of the Act, filed a charge with the Board alleging that Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (i) and (ii), subparagraphs (A) and (B), of the Act. A copy of said charge is attached hereto as Exhibit 1 and made a part hereof.

(b) On or about June 1, 1961, Swift & Company, Meat Packing Plant, Swift & Company, Sales Units (divisions of Swift & Company) and Armour and Company (herein called Swift Plant, Swift Sales and Armour, respectively), pursuant to provisions of the Act, filed separate charges with the Board alleging that respondent, a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (1) and (2), subparagraphs (A) and (D) of the Act. Copies of said charges are attached hereto as Exhibits 2 through 7.

4. The aforesaid charges were referred to petitioner as Regional Director of the Thirteenth Region of the Board.

5. Upon the basis of the following, petitioner has reasonable cause to believe that said charges are true, and that a complaint of the Board based on said charges should issue against respondent pursuant to Section 10 (b) of the Act. More particularly, petitioner has reasonable cause to believe, and believes, that respondent is a labor organization within the meaning of Sections 2 (5), 8 (b) and 10 (1) of the Act, and that said respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8 (b) (4) (1) and (2), subparagraphs (A), (B) and (D) of the Act, affecting commerce within the meaning of Sections 2 (6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated Association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal offices in Chicago, Illinois, and at all times material herein has been engaged within this judicial district in transacting business and in promoting and protecting the interests of its employee members.

(c) Wilson, Swift Plant, Swift Sales and Armour, each is engaged, at various locations in the Chicago, Illinois area and in various other locations in the United States, in the processing and/or wholesale distribution of meat and meat products. In the operation of their businesses, Wilson, Armour and Swift & Company each annually receives and ships meat and meat products, valued at in excess of \$50,000 across State lines.

(d) Nebraska Short Lines and Frozen Food Express (herein called Nebraska and Frozen, respectively) are engaged at Omaha, Nebraska and Dallas, Texas, respectively, in the interstate transportation of freight by motor carrier. Nebraska and Frozen each annually receives in

excess of \$50,000 for the transportation of goods and materials across State lines.

(e) In the course of their businesses, Nebraska and Frozen regularly transport with the use of their own over-the-road truck drivers meat and meat products into the Chicago city limits for Wilson.

(f) At all times material herein, respondent has had a dispute with Nebraska, Frozen and other carriers who are not signatories to the "Central States" or other "Over-The-Road Teamster Motor Freight Agreement."

(g) At no time material herein has respondent been certified by the Board as the collective bargaining representative of any of the over-the-road drivers of Armour, Swift Plant or Swift Sales engaged in making retail store door deliveries within the Chicago city limits and at no time material herein has the Board issued an order directing Armour, Swift Plant or Swift Sales to bargain with respondent as the representative of said employees.

(h) At all times material herein, Armour, Swift Plant and Swift Sales have assigned the work of making retail store door deliveries within the Chicago city limits referred to in subparagraph (g) above to their own respective employees who are members of, or represented by other labor organizations and who are not members of, or represented by respondent.

(i) Since prior to June 1, 1961, respondent has demanded that Wilson, Swift Plant, Swift Sales and Armour enter into separate similar contracts containing a clause, namely "Article XXXIII," and an "Addendum to Agreement" which would, among other things, require each said employer to cease doing business with other persons who are not signatories to similar contracts with respondent. Said Article XXXIII and Addendum to Agreement provide as follows:

ARTICLE XXXIII. EXTRA EQUIPMENT.

Livestock, meat and meat products for delivery by truck to a distance not exceeding 50 miles from the Chicago Stock Yards, whether to final destination or point of transfer, shall be delivered by the company in their own equipment, except when there is a lack of equipment at individual plants or branches, and then a cartage company who employs members of Local No. 710 will be used. Employer agrees to do all possible to use own equipment at all times.

ADDENDUM TO AGREEMENT.

It is agreed by and between the employer and the union that the following addendum shall be a part of the collective bargaining agreement in effect between the employer and the union. The employer agrees that all meat and meat products which originate with the employer for truck shipment into and out of the Chicago city limits will be done by a certificated carrier who is a party to the Central States or other Over-The-Road Teamster Motor Freight Agreement.

All local overflow cartage shipments of meat and meat products originating with the employer in Chicago will be transported by cartage companies who are parties to the collective bargaining agreement referred to above.

Company owned or company leased equipment is exempt from this addendum except that employer over-the-road drivers will not be permitted to make retail store door deliveries within the Chicago city limits. Leased equipment leased directly to the company will be considered the same as employer owned equipment.

(j) Also, since prior to June 1, 1961, respondent has demanded that Swift Plant, Swift Sales and Armour assign the delivery work referred to in subparagraphs (g) and (h) above, to employees who are members of, or repre-

sented by, respondent rather than to employees who are members of, or represented by other labor organizations, and who are not members of, or represented by respondent. Swift Plant, Swift Sales and Armour have refused to accede to said demands.

(k) In furtherance of its dispute with Nebraska and Frozen, as set forth in subparagraph (f) above, and in furtherance of its demand that Wilson enter into the contract and Addendum to Agreement referred to in subparagraph (i) above, respondent, since on or about June 1, 1961, has engaged in a strike or has picketed the premises of Wilson.

(l) In furtherance of its demands set forth in subparagraphs (i) and (j) above, since on or about June 1, 1961, respondent has engaged in a strike or has picketed the premises of Swift Plant, Swift Sales and Armour.

(m) As a result of respondent's acts and conduct aforesaid, the employees of Wilson, Swift Plant, Swift Sales and Armour have refused to perform services for their respective employers, and, as a consequence, deliveries of meat and meat products in the Chicago, Illinois area have been stopped.

(n) By the acts and conduct set forth in subparagraphs (k), (l) and (m) above, respondent has engaged in, and has induced and encouraged individuals employed by Wilson, Swift Plant, Swift Sales, Armour and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and have threatened, coerced and restrained Wilson, Swift Plant, Swift Sales, Armour, and other persons engaged in commerce or in industries affecting commerce.

(o) Objects of the acts and conduct of respondent set forth in subparagraphs (k), (m) and (n), as pertains to Wilson's employees only, were and are to (1) force or require Wilson to cease doing business with Nebraska, Frozen, or any other employer who is not a certificated carrier signatory to the Central States or other Over-The-Road Teamster Motor Freight Agreement, and (2) to force or require Wilson, or any other employer, to enter into a contract which would require Wilson, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Wilson, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using selling, transporting, or otherwise dealing in any of the products of any other employer, or doing business with any other person.

(p) Objects of the acts and conduct of respondent set forth in subparagraphs (l), (m) and (n), except as pertains to Wilson's employees, were and are to (1) force or require Swift Plant, Swift Sales, Armour, or any other employer, to enter into a contract which would require Swift Sales, Swift Plant, Armour, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Swift Plant, Swift Sales, Armour, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or doing business with any other person; and (2) to force or require Swift Plant, Swift Sales and Armour to assign the work of making retail store door deliveries within the Chicago city limits to employees who are members of, or represented by respondent, rather than to employees who are not members of, or represented by, respondent.

6. It may fairly be anticipated that, unless enjoined, respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (k), (l), (m) and (n) above, or similar or like acts and conduct in violation of Section 8 (b) (4) (1) and (2), subparagraphs (A), (B) and (D) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10 (4) thereof, that, pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, petitioner prays:

1. That the Court issue an order directing respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Picketing at or in the vicinity of the premises of Wilson, Swift Plant, Swift Sales or Armour.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Wilson, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, mate-

rials, or commodities or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Wilson, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Wilson (1) to cease doing business with Nebraska, Frozen or any other employer who is not a certificated carrier signatory to the Central States or other Over-The-Road Teamster Motor Freight Agreement, and (2) to force or require Wilson, or any other employer, to enter into a contract which would require Wilson, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Wilson, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or doing business with any other person; and

(c) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Swift Plant, Swift Sales, Armour, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Swift Plant, Swift Sales, Armour, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is (1) to force or require Swift Plant, Swift Sales, Armour, or any other employer, to enter into a contract which would require Swift Plant, Swift Sales,

Armour, or such other employer, to do business only with signatories to similar contracts, or to enter into any other contract or agreement, express or implied, whereby Swift Plant, Swift Sales, Armour, or such other employer, ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or doing business with any other person; and (2) to force or require Swift Plant, Swift Sales and Armour to assign the work of making retail store door deliveries within the Chicago city limits to employees who are members of, or represented by, respondent, rather than to employees who are not members of, or represented by, respondent.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Chicago, Illinois, this 5th day of June, 1961.

Telephone: CEntal 6-9660.

/s/ Ross M. Madden,
*Regional Director, Thirteenth Region,
National Labor Relations Board.*

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JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No.

~~888~~

28

~~BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL
TRANSPORTATION COMPANY, WATSON BROS. TRANS-
PORTATION CO., INC., RED BALL TRANSFER CO., IN-
TERSTATE MOTOR FREIGHT SYSTEM, INC., INDE-
PENDENT TRUCKERS, INC., ILLINOIS-CALIFORNIA
EXPRESS, INC., INTERSTATE MOTOR LINES, INC.,
NAVAJO FREIGHT LINES, INC., AND RINGSBY TRUCK
LINES, INC.,~~

Appellants.

AND

**GENERAL DRIVERS AND HELPERS UNION, LOCAL 554,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA.**

Appellant.

vs.

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, AND NEBRASKA SHORT LINE CARRIERS,
INC.,**

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.**

JURISDICTIONAL STATEMENT.

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Omaha 2, Nebraska (341-2250),
*Counsel for General Drivers and
Helpers Union, Local 554, affiliated
with The International Brotherhood
of Teamsters, Chauffeurs, Ware-
housemen and Helpers of America,
Appellant.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961.

No. _____

~~BURLINGTON TRUCK LINES, INC., SANTA FE TRAIL
TRANSPORTATION COMPANY, WATSON BROS. TRANS-
PORTATION CO., INC., RED BALL TRANSFER CO., IN-
TERSTATE MOTOR FREIGHT SYSTEM, INC., INDE-
PENDENT TRUCKERS, INC., ILLINOIS CALIFORNIA
EXPRESS, INC., INTERSTATE MOTOR LINES, INC.,
NAVAJO FREIGHT LINES, INC., AND RINGSBY TRUCK
LINES, INC.,~~

~~Appellants.~~

AND

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, AND NEBRASKA SHORT LINE CARRIERS,
INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

Appellant, General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, of

America, appeal from the judgment of the United States District Court for the Southern District of Illinois, Northern Division, from the final order dismissing their complaint, entered in this action on April 27, 1961, to set aside an order of the Interstate Commerce Commission, dated June 1, 1959, which authorized the performance of motor carrier operations by Nebraska Short Line Carriers, Inc. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this matter and that substantial questions are presented.

OPINION BELOW.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31 (advance sheets). A copy of the opinion is attached as Appendix A. The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599, and a copy is attached as Appendix B.

JURISDICTION.

This action is brought pursuant to the provisions of 28 U. S. C. 1336, to set aside an order of the Interstate Commerce Commission. On April 27, 1961, a judgment of the District Court for the Southern District of Illinois, Northern Division, was entered; a notice of appeal was filed in that court by appellant on June 22, 1961. Jurisdiction of the Supreme Court to review this decision by direct appeal is pursuant to 28 U. S. C. 1253 and 2101 (b). Jurisdiction of the Supreme Court to review this judgment on direct appeal is sustained in the following cases: *American Trucking Association, Inc., v. United States*, 364 U. S. 1; *Schaffer Transportation Company v. United States*, 355 U. S. 83; *M. & M. Transportation Co. v. United States*, 350 U. S. 857.

STATUTES INVOLVED.

Sections 207 (a) and 212 of the Interstate Commerce Act, 49 U. S. C. 307 (a) and 312; and Section 703 of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 8 (3).

QUESTIONS PRESENTED.

1. Whether the issuance of Motor Carrier Certificates by the Interstate Commerce Commission as a result of labor disputes and because of the non-union character of applicant exceeds the statutory power of the commission and is contrary to the policy of Congress.
2. Whether the request for operating authority by Nebraska Short Line Carriers, Inc., Appellee, was based primarily on facts and circumstances within the exclusive jurisdiction of the National Labor Relations Board and outside the jurisdiction of the Interstate Commerce Commission.
3. Whether temporary interruptions of interlining between non-union intra-state motor carriers and some interstate motor carriers in a particular area arising out of a labor dispute, may, consistent with the standards set forth in the Interstate Commerce Act and National Transportation Policy be made the basis for the grant of permanent operating authority to a non-union carrier in that area.
4. Whether the Commission erroneously used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a situation where the appropriate remedy, if any, was a proceeding under Section 212 of the Interstate Commerce Act (49 U. S. C. 312) to compel certain carriers to comply with their obligations under their Certificates of Public Convenience and Necessity.

STATEMENT.

This appeal is based on an action by the Burlington Truck Lines, Inc., a corporation, against the Interstate Commerce Commission and the United States of America, in which Burlington Truck Lines, Inc., appellant herein, requested the Federal District Court to enter a decree to adjudge the orders of the Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, in the matter of Nebraska Short Line Carriers, Inc.,—Common Carrier Application—Doc. No. MC-116067 to be unlawful, null and void and in violation of the Interstate Commerce Act. Appellant, General Drivers and Helpers Union Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, intervened in this proceeding alleging substantially the same matters that were stated in the original complaint of Burlington Truck Lines, Inc.

In addition some nine motor carriers intervened and each based intervention on substantially the same allegations.

Nebraska Short Line Carriers, Inc., appellee herein, and the applicant before the Commission, is a Nebraska corporation organized by twelve intra-state Nebraska motor carriers; it sought rights from the Interstate Commerce Commission because of the fact that existing carriers were alleged to have declined to perform interchange operations with motor carriers that were stockholders in Nebraska Short Line Carriers, Inc. All stockholders of Nebraska Short Line Carriers, Inc., are non-union carriers who have been subjected to union organizational activity and who desire to operate as non-union carriers.

The factual situation involved herein began some time in 1955 when the Teamsters union undertook to organize common carrier employees in Nebraska. Several primary strikes occurred at this time, including one against one of

the stockholders of Nebraska Short Line Carriers, Inc., Clark Brothers Transfer Company. In addition to this, other stockholder carriers of Nebraska Short Line Carriers, Inc. were contacted by Teamster representatives for organizational purposes and also for purposes of executing collective bargaining agreements. When the stockholder carriers refused, the Teamster union invoked the provisions of Article IX of their agreement, sometimes referred to as the "hot cargo" clause (Appendix D, pages 3, 4, Par. 2). Appellants are unionized carriers who have executed collective bargaining agreements with the Teamsters union containing "hot cargo" clauses. These clauses are properly referred to as "protection of rights" clauses; they provide that the carrier will not discharge or discipline any employee who refuses to cross a picket line or handle unfair goods, which unfair freight and goods have been designated such by the Teamsters because of a labor dispute.

Nebraska Short Line Carriers, Inc., filed an application seeking a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission on June 22, 1956; the case was designated as Doc. No. MC-116067. The matter was heard over an extensive period of time by Trial Examiner Donald R. Sutherland of the Interstate Commerce Commission, who, in an order dated September 3, 1957, recommended denial of the application (Appendix C). Nebraska Short Line Carriers, Inc., on January 10, 1957, filed another application seeking a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission in Doc. No. MC-116067, Sub No. 2. On August 8, 1957, Trial Examiner Michael B. Driscoll recommended that the application be denied (Appendix D).

Thereafter, the matters were orally argued to the Interstate Commerce Commission in a combined hearing and the Commission on June 1, 1959, partially granted said applications in a single report (Appendix B). The denial of

the application by Examiner Driscoll was affirmed by the Interstate Commerce Commission; Examiner Sutherland's decision was reversed in part and affirmed in part.

The finding of facts in both Trial Examiners' reports indicated that the temporary interchange interruptions arose as a result of a labor dispute. This is borne out by Examiner Driscoll's findings of fact. (Appendix D, page 171) in which it was stated:

12. *As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation. (Emphasis Supplied.)*

Both Examiners' reports indicate that the basis for applicants' request for authority was because of their non-union status.

After the Commission's grant of authority, and within proper time limits, appellant Burlington Truck Lines, Inc., brought an action to set aside the order. General Drivers and Helpers Union Local 554 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, intervened in this action. The Three Judge District Court upheld the Commission's order and dismissed the complaint, one of the judges, Judge Mercer, dissenting (Appendix A).

QUESTIONS ARE SUBSTANTIAL.

This proceeding involves substantial questions of the interaction of two Federal Acts, first the Interstate Commerce Act, regulating common carriers of motor freight, and secondly, the Labor-Management Relations Act of 1947

and the amendments enacted by Congress in 1959 in the Labor-Management Reporting and Disclosure Act of 1959. A very significant and important question arises in this proceeding as to whether or not protected rights under Federal labor legislation, involving strikes and labor disputes and requests for collective bargaining, can be used as a basis by another Federal agency under the Interstate Commerce Act in granting a Certificate of Convenience and Necessity to Nebraska Short Line Carriers, Inc. The facts indicate in this matter that a labor dispute between the Teamsters and certain non-union carriers, stockholders of Nebraska Short Line Carriers, Inc., initiated and was responsible for the proceedings before the Commission; a very substantial question is presented by these facts as to whether public convenience and necessity require the granting of operating rights to the applicant before the Commission as a result of and based upon a temporary labor dispute. The fact that a labor dispute existed in this matter between the Teamsters and stockholder carriers of Nebraska Short Line Carriers, Inc., is not in dispute.

This case involves a novel departure from the standards set forth in the Interstate Commerce Act and the National Transportation Policy; the question of whether the Interstate Commerce Commission can depart from the standards and policies as established by Congress is exceedingly substantial in nature and involves the rights of workers, publicly regulated carriers, and the public in general. Transportation by motor carrier is a vital element in the economic life of this country; the rights of workers in industries engaged in this activity are just as vital.

Another important and basic question involved in this proceeding is whether the complaints of the non-union carriers were within the exclusive jurisdiction of the National Labor Relations Board and outside the jurisdiction and competence of the Interstate Commerce Commission.

ARGUMENT.

(A) The Issuance of Motor Carrier Certificates by the Interstate Commerce Commission as a Result of Labor Disputes and Because of the Non-Union Character of Applicants Exceeds the Statutory Power of the Commission and Is Contrary to the Policy of Congress.

The Interstate Commerce Commission does not have power to determine labor disputes, even those involving common carriers. It has the power of granting Motor Carrier Certificates and of determining complaint cases involving refusal of motor carriers to service shippers and to prevent discrimination with regard to shippers. The power to issue certificates authorizing the institution of motor carrier service was granted to the Commission in order to enable it to authorize such services in the areas where a permanent need for such services was shown. This power was never intended as an instrument for the solution of labor disputes or the resolution of labor problems.

Although the Commission has stated in its decision and order granting the rights involved in this matter, that it is not resolving a labor dispute or involving itself in labor problems in any manner or form, it is obvious from the facts in this matter that the Commission has relied primarily upon a labor dispute situation and the non-union character of applicant as the basis for granting interstate operating rights. Despite statements to the contrary in the decision of the Interstate Commerce Commission, its decision is based primarily upon an evaluation of a labor dispute. It is very significant that in Trial Examiner Driscoll's report (Appendix D, page 171) a finding was made, based upon the statement of applicant,

that if issued a certificate of convenience and necessity, such a certificate could contain a provision to the effect that, "If it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation." Applicant further stated to the Trial Examiner that under no conditions would it ever agree to a union contract containing any "hot cargo" provisions. Can the Commission disregard this statement that applicant voluntarily made in one of its proceedings and grant the application, which concerned itself primarily with a refusal to sign and execute a union contract containing a "hot cargo" provision? Obviously, the "hot cargo" clause must have been the basis for applying for interstate operating rights by the Nebraska Short Line Carriers, Inc.

Prior to the 1959 amendments (Labor-Management Reporting and Disclosure Act of 1959 29 U. S. C. 158, 73 Stat. 543, Section 8 (e), Section 703 (b), 73 Stat. 519) union inducement of concerted work stoppages to compel adoption or enforcement of hot cargo agreements was unlawful under the secondary-boycott ban. However, this Court held, in *Carpenters, Local 1976 v. NLRB*, 357 U. S. 93, commonly known as the Sand Door case, although union inducement of work stoppages to enforce hot cargo agreements violated the secondary-boycott ban, *the voluntary observance of a hot-cargo agreement by an employer did not violate that ban, and that the mere execution of a hot cargo agreement was not, in itself, inducement of employees to refuse to handle hot cargo, in violation of the ban*. This ruling, it is submitted, is still applicable under the 1959 amendments. Under the 1959 amendment, a protection of rights clause (hot cargo) would not necessarily violate Section 8 (e) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 158, 73 Stat. 543).

The 1959 amendments (Section 8 (c), Section 703 (b), 73 Stat. 519, Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 158, 73 Stat. 543) bans express or implied hot cargo agreements between employers and unions and makes the entering into of any such agreements an unfair labor practice on the part of both employers and unions; in addition it declared such agreements void and unenforceable. If this clause constitutes the basis for Nebraska Short Line Carriers, Inc., application for certificate of convenience and necessity, then the reason for the application has been eliminated by Congressional action.

The power to issue motor carrier certificates by the Interstate Commerce Commission was never intended as an instrument for the solution of labor disputes. Congress has protected certain activities of employees and their bargaining representatives including the right to strike and to engage in concerted activities as a legitimate means by which labor organizations may represent and bargain for employees pursuant to the provisions of the Labor-Management Relations Act, 29 U. S. C. 1 *et seq.* Power granted to the Commission by Congress was never intended as a weapon to destroy legal collective bargaining clauses and the legitimate objectives and purposes of labor organizations or to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes.

There is no assurance that the employees of Nebraska Short Line Carriers, Inc., may not in the future decide to form, join or assist a labor organization and to secure a collective bargaining agreement from it. Perhaps, during collective bargaining, a similar provision to a "hot cargo" clause may be submitted to Nebraska Short Line Carriers, Inc., by a labor organization representing its employees, which clause may meet the legal test. If this situation presented itself to Nebraska Short Line, would it then

surrender the certificate granted by the Commission in consonance with its offer in Examiner Driscoll's report (Appendix D, page 171)?

To grant a certificate of convenience and necessity upon the basis of a non-union character of an applicant arising out of a temporary labor dispute and collective bargaining clauses involving the handling or non-handling of freight, would open the door to many applications for certificates of convenience and necessity based on labor disputes. The exclusive regulation of labor relations resides in the National Labor Relations Board, not the Interstate Commerce Commission.

(B) The Request for Operating Authority by Nebraska Short Line Carriers, Inc., Appellee, Was Based Primarily on Facts and Circumstances Within the Exclusive Jurisdiction of the National Labor Relations Board and Outside the Jurisdiction of the Interstate Commerce Commission.

Applicant, to sustain its contentions for the granting of a certificate of convenience and necessity on the basis of the applicant's non-union character and on the basis of alleged secondary boycotts, presents a novel situation and one that is without precedent as the basis for the issuance of motor carrier operative authority. Applicant invoked the jurisdiction of the Interstate Commerce Commission to grant a certificate of convenience and necessity to it on the basis of activities that are exclusively within the purview of the Labor Management Relations Act of 1947, 29 USCA 150. Congress, in enacting said Act, considered the extent to which labor practices affecting interstate commerce should be regulated. Without question, it left these matters solely and exclusively to the National Labor Relations Board and to proceedings under the above

quoted Act. By such action, the matters involved herein and under which applicant complains are outside the competence of the Interstate Commerce Commission. Congressional policy was set out in the preamble of the statute. Consequently, if applicant or any other neutral employer is involved in an alleged secondary boycott activity on the part of a union, it has an adequate remedy in the courts and before the National Labor Relations Board pursuant to the provisions of the above statute. Neutrals are protected from involvement in labor disputes by virtue of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended. The Court of Appeals for the Second Circuit, with regard to this situation, stated:

"We have here a problem involving the rights of neutrals in a lawful economic war between an employer and a union. The Taft-Hartley Act does not completely shelter neutrals * * * Instead, the Act recognizes and undertakes to reconcile the competing claims of unions to strike and of bystanders to be free of harm from so-called 'secondary boycotts'."

NLRB v. Service Trade Chauffeurs, 191 F. 2d 65, 67 (C. A. 2).

Section 10 (a) of the Act is as follows:

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; * * *"

Congress gave sole and exclusive power to the National Labor Relations Board to prevent unfair labor practices, the same activities as applicant alleges have been involved in this matter.

Perhaps the two most important cases with regard to the exclusive jurisdiction of the National Labor Relations Board are:

Garner v. Teamsters Union, 346 U. S. 485 (1953),
and
Weber v. Anheuser-Busch, Inc., 348 U. S. 468
(1955).

In both these cases, this Court refused to pass upon the question of whether the Union's conduct was protected or prohibited under the Act; instead, it left the sole power to administer the Act to the National Labor Relations Board.

Under the Labor Management Relations Act, not only are there prohibitions against certain particular union activities as set forth in Section 8 (b) 29 USCA paragraph 158 (b), but at the same time, it accorded to labor, in Section 7 of the same Act, rights of self-organization, collective bargaining and concerted action for mutual aid or protection. In addition to the above acts, it is the duty of an employer to bargain collectively in good faith with the representative of his employees. In view of the declared public policy of the Labor Management Relations Act and the fact that it was enacted by Congress in 1947 after passage of the Motor Carrier Act, it is reasonable to say that Congress did not consider that another federal agency, the Interstate Commerce Commission, would intervene in the same area as the National Labor Relations Board on the same subject matter. In *Garner v. Teamsters Union*, *supra*, the Court stated:

"Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

In a series of decisions, the Supreme Court of the United States has again re-emphasized this doctrine; *Gus v. Utah LRB*, 77 S. Ct. 598; *Amalgamated Meat Cutters v. Fairlawn*, 77 S. Ct. 604; *San Diego Building Trades v. Garmon*, 77 S. Ct. 607. Thus, it is obvious that in recent decisions of this Court, it has been made abundantly clear that regulation of labor relations and collective bargaining is solely within the jurisdiction of the National Labor Relations Board. Not only are states and administrative agencies of states prohibited from invading the field of labor relations as to industries that affect interstate commerce, but even federal courts and agencies are likewise excluded from this area of regulation, *Weber v. Anheuser-Busch, supra*, (348 U. S. 479). Granting a certificate of convenience and necessity to the applicant in this matter on the basis of the non-union character of applicant and on the basis of alleged secondary boycott activity by a union, injects the Commission into the area of labor relations and collective bargaining. This invades the basic jurisdiction of another federal agency and opens the door to multitudinous litigation before the Commission. There have been numerous instances where Congress has created an administrative agency and defined the scope of its activities, thereby placing them in a superseding position with respect to another administrative agency: *Eugene Dietzgen Co. v. FTC*, 142 F. 2d 321, 331 (CA 7, 1944), cert. den. 323 U. S. 730 (1944); *United Corp. v. FTC*, 110 F. 2d 473, 475 (CA 4, 1940); *Chamber of Commerce of Minneapolis v. FTC*, 13 F. 2d 673, 685-686 (CA 8, 1926); *U. S. v. Western Union Telegraph Co.*, 53 F. Supp. 377, 381 (S. D. N. Y., 1943); *T. C. Hurst & Son v. FTC*, 268 Fed. 874, 877 (E. D. Va., 1920); *Far East Conference v. U. S.*, 342 U. S. 570, 573-574 (1952); *U. S. v. Rock Royal Cooperative*, 307 U. S. 533, 558-560 (1939); *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 485 (1932); cf. *U. S. v. American Trucking Assns.*

310 U. S. 534, 544-545 (1940); *Brougham v. Blanton Mfg. Co.*, 249 U. S. 495, 499 (1919).

In two decisions, this Court held the *Weber vs. Anheuser-Busch* opinion controlling and that the Labor Management Relations Act of 1947 prevents a state from applying its laws defining the duties of a common carrier and invalidating the hot cargo provisions in collective bargaining contracts with interstate commerce carriers: *General Drivers, Warehousemen, etc., Local Union 89 v. American Tobacco Co.*, 348 U. S. 978; and *Teamsters, Local 327 v. Korrigan Iron Works*, 353 U. S. 968. In the latter case, carriers and their employees had been enjoined from refusing to cross picket lines at a struck shipper's premises despite the contract clause which allowed employees to refuse to handle the goods of a struck firm. The state court reasoned that a state law requiring carriers to render service gave it authority regardless of the Taft-Hartley Act. In the latter case, this Court, in a per curiam decision, held the opposite.

(C) Temporary Interruptions of Interlining Between Non-Union Intrastate Motor Carriers and Some Interstate Motor Carriers in a Particular Area Arising Out of a Labor Dispute May Not, Consistently With the Standards Set Forth in the Interstate Commerce Act and the National Transportation Policy, Be Made the Basis for the Grant of Permanent Operating Authority to a Non-Union Carrier in That Area.

Pursuant to the provisions of Section 207 (a) of the Motor Carrier Act, 49 U. S. C. 307 (a), the Commission has authority to assure the public of adequate common carrier service. The National Transportation Policy seeks to foster sound economic conditions in transportation and among the several carriers. There must be a showing of

inadequacy of service for the Commission to grant certificates to new carriers.

Labor disputes are temporary in character and eventually either fade out or are settled by the disputants. If the Commission grants certificates to new carriers to serve areas affected by labor disputes, without finding that there is an inadequacy of service, it is submitted that the Commission has misinterpreted the Act by granting permanent rights to meet an admittedly temporary situation. This does not conform to the National Transportation Policy as set out in the Interstate Commerce Act. The Commission recognized in *Montgomery Ward and Company v. Consolidated Freightways*, 42 M. C. C. 225, motor carrier inability to serve premises where a strike was in progress. Although the Commission in the decisions involved disavowed that it was resolving a labor dispute or that the basis of granting rights to Nebraska Short Line Carriers, Inc., was on the basis of a labor dispute, the inescapable conclusion is that the labor dispute was the motivating factor in the application and in the presentation of evidence to the Trial Examiners by applicant. The Commission totally ignored the *Montgomery Ward and Company v. Consolidated Freightways*, *supra*, case. In addition, there was no dispute in the record and in the recommendations and report of the Trial Examiners that some unionized carriers serviced the areas involved.

Nebraska Short Line Carriers, Inc., applicant, and appellee herein, and its stockholder carriers, as well as shippers, had an adequate remedy for breach of duty against the unionized carriers in the instant matter. Failure to file a complaint against the unionized carriers and to follow this procedure under the Interstate Commerce Act (Section 49, U. S. C. 312) does not warrant the granting of operating authority. Nebraska Short Line Carriers, Inc., and its stockholder carriers, had an adequate opportunity to pre-

vent, by the complaint procedure before the Commission, the very activity of the Teamsters and unionized carriers it complained of during this period.

(D) The Commission Erroneously Used the Grant of Additional Operating Authority Under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a Situation Where the Appropriate Remedy, If Any, Was a Proceeding Under Section 212 of the Interstate Commerce Act (49 U. S. C. 312) to Compel Certain Carriers to Comply With Their Obligations Under Their Certificates of Public Convenience and Necessity.

Nebraska Short Line Carriers, Inc., in its presentation to the Trial Examiners, and its arguments to the Commission, sought to show that contractual relations between the Teamsters and unionized carriers involving the hot cargo clause and action thereunder by the Teamsters Union, ignited the situation that forced them to apply for operating rights. The labor dispute was admittedly temporary and constituted the motivating factor in the application. Broad authority is granted the Commission under Section 212 of the Motor Carrier Act (49 U. S. C. 312) to compel compliance by a carrier with the duties and obligations imposed upon it by its certificate of public convenience and necessity. Nebraska Short Line Carriers, Inc., and its stockholder carriers failed to file complaints under this section with the Commission, which complaints conceivably could have prevented the alleged interruptions of service in the area serviced by the stockholder carriers of Nebraska Short Line Carriers, Inc. The complaint procedure on the part of the stockholder carriers would have provided a more adequate remedy for their situation.

The Commission has previously ruled in several cases

that it can compel a carrier to comply with the Act and perform duties and obligations imposed upon it. *Montgomery Ward and Company v. Santa Fe Trail Transportation Co.*, 46 M. C. C. 212; *Planters Nut & Chocolate Co. v. American Transfer Company*, 31 M. C. C. 719.

CONCLUSION.

The issues involved in this matter are novel and distinct and the questions presented are of substantial and public importance. The issues vitally affect the transportation industry and its employees in this country. Several federal laws are involved that overlap in the labor relations and public transportation field. The areas of regulation of labor relations and transportation must be well defined in the legal arena so that common carriers, their employees, the bargaining representatives of the employees and the public can be informed of the legalities. For these reasons and for the reasons previously advanced in this Brief, it is submitted, respectfully, that jurisdiction should be noted and that the judgment of the district court be reversed and the case remanded to that court for disposition consistent with this court's opinion.

Respectfully submitted,

DAVID D. WEINBERG,

300 Keeline Building,
Omaha 2, Nebraska,

*Attorney for General Drivers
and Helpers Union, Local
554, affiliated with The In-
ternational Brotherhood of
Teamsters, Chauffeurs,
Warehousemen and Helpers
of America, Appellant.*

Dated: August, 1961.

CERTIFICATE OF SERVICE.

I, David D. Weinberg, attorney for General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant; and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1961, I served copies of the foregoing Jurisdictional Statement, Brief and attached Appendices to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States by mailing a copy in a duly addressed envelope with postage prepaid to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to Robert A. Bicks, Assistant Attorney General; John H. D. Wigger, Attorney, and The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air-mail postage prepaid to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois, Attorneys for Nebraska Short Line Carriers, Inc.

4. On Burlington Truck Lines, Inc., Appellant, by mailing a copy in a duly addressed envelope with postage

prepaid to James A. Gillen and Russell B. James, 547 West Jackson Boulevard, Chicago 6, Illinois, attorneys for said Appellant.

5. On Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Appellants, by mailing a copy in a duly addressed envelope with postage prepaid to David Axelrod, of Axelrod, Goodman & Steiner, 39 South La Salle Street, Chicago 3, Illinois, attorneys for said Appellants.

6. On Santa Fe Trail Transportation Company, Appellant, by mailing a copy in a duly addressed envelope with postage prepaid to Starr Thomas and Roland J. Lehman, 80 East Jackson Boulevard, Chicago 4, Illinois, attorneys for said Appellant.

DAVID D. WEINBERG,

*Counsel for General Drivers and
Helpers Union, Local 554, affiliated with The International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen
and Helpers of America, Appellant.*

Address:

300 Keeline Building,
Omaha 2, Nebraska.

APPENDIX A.

Burlington Truck Lines, Inc. et al.

vs.

United States of America and Interstate Commerce
Commission.

194 F. Supp. 31 (Advance Sheets).

Before MAJOR, *Circuit Judge*, and MERCER and POOS,
District Judges.

Poos, D. J.: Burlington Truck Lines, Inc., a Corporation, plaintiff, filed its complaint seeking injunctive relief against Interstate Commerce Commission and the United States to restrain the enforcement of the orders of Interstate Commerce Commission granting a limited certificate of convenience and necessity to Nebraska Short Line Carriers, Inc., in the Commission proceedings entitled, "*Nebraska Short Line Carriers, Inc., Common Carrier Application*, Docket No. MC 116067."

Jurisdiction is authorized by Title 27, U. S. Code, Sections 1336, 1398, 2284, and 2321 through 2325, inclusive, all of which authorize interested parties to seek relief from a three-judge United States District Court.

PARTIES TO PROCEEDINGS.

The intervening plaintiffs are Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Trucks, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines,

Inc., Ringsby Truck Lines, Inc., and General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The effect of the pleadings of interveners is to adopt the allegations and theory of the plaintiff's complaint.

Plaintiff, and all interveners, except the labor union, are common carriers by motor vehicle in interstate commerce and subject to the Interstate Commerce Act. Plaintiff is authorized to engage in transportation of general commodities to, from and between points in Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska and Wyoming, pursuant to a "Certificate of Public Convenience and Necessity," issued to it by the Interstate Commerce Commission. Its residence and principal offices are located in Galesburg, Knox County, Illinois. Watson Bros. Transportation Company, Inc., The Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., are likewise common carriers and are authorized to do business by virtue of "Certificates of Convenience and Necessity," issued by Interstate Commerce Commission to them in various proceedings and orders of the Commission. Their operations cover the States of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming, and the various business offices of these motor carriers are located at Denver, Colorado, Grand Rapids, Michigan, Omaha, Nebraska, and Salt Lake City, Utah. The application of

Nebraska Short Line Carriers was opposed before the Commission by eighteen motor and rail carriers, and the intervening plaintiffs were included. All class rail carriers in western trunkline territory likewise opposed the application, as did the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local No. 554 thereof.

NATURE OF COMPLAINT.

The complaint alleges that Nebraska Short Line Carriers, Inc., by application filed June 22, 1956, Docket No. MC 116067, sought authority from the Commission to conduct operations as a common carrier in interstate and foreign commerce in the transportation of general commodities, with certain exceptions over irregular routes, between Denver, Colorado and Chicago, Illinois; between Omaha, Nebraska and Chicago, Illinois; between Minneapolis, Minnesota and Des Moines, Iowa; between Council Bluffs, Iowa and St. Louis, Missouri; and between Lincoln, Nebraska and St. Joseph, Missouri, serving intermediate and off route points on said routes; and that by application filed January 10, 1957, Docket No. MC-H16067, (Sub. No. 2), sought authority to operate as a common interstate and foreign motor carrier in the transportation of general commodities, with certain exceptions over irregular routes between Omaha, Nebraska, on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming; that in Case No. MC 116067, the hearing examiner by proposed order served September 3, 1957, recommended to the Commission that the application

be denied because Nebraska Short Line Carriers had failed to prove public convenience and necessity, and for the same reason by proposed order served August 8, 1957, in Case No. MC-116067, (Sub. No. 2) recommended that the application be denied; the Commission by order dated June 1, 1959 consolidated both cases and granted authority to applicant to operate as a common carrier by motor vehicle in the transportation of general commodities with certain exceptions over regular route between Omaha, Nebraska and Chicago, Illinois, and between Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate points of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska, but denied the other application for additional rights; that by order dated March 10, 1960, the Commission denied the petitions for reconsideration and/or further hearing as filed by certain protesting carriers including the petition for reconsideration of plaintiff filed on July 27, 1959; and the complaint further alleges that the decision of the Commission is contrary to law for the same fourteen reasons, which, on analysis, challenge the jurisdiction of the Interstate Commerce Commission to enter the order in question under the law and the evidence.

REQUESTED RELIEF.

The relief prayed is for entry of a decree adjudging the orders of Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, to have been entered in violation of the Interstate Commerce Act, and therefore unlawful, null and void, and for such other relief as the court deems meet. The intervening motor carriers adopted the allegations of the complaint. Intervening plaintiff, The General Drivers and Helpers Union, Local 554, allege substantially the same matters as plaintiff, and alleged in addition that the basis for the application of Nebraska

Short Line Carriers, Inc., was a desire to protect itself from the so-called "hot-cargo" clause" provision of the labor contract entered into by the union plaintiff and intervening plaintiffs' carriers.

POSITION OF DEFENDANTS AND INTERVENING DEFENDANT.

The defendants and intervening defendant, Nebraska Short Line Carriers, Inc., filed answers to the complaint, intervening carriers' complaints, and to the intervening complaint of Local 554, in and by which all factual allegations were denied and refer to and adopt the record of Interstate Commerce Commission for the complete and accurate facts and findings made by the Commission. They admit that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organizations affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but allege that the Commission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over the actions of common carriers in relation to their obligations to the public under said Act, and where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as may be necessary to carry out the purposes of the National transportation policy; and admit that the Interstate Commerce Act does not contemplate or provide for issue of certificates of public convenience and necessity as a penalty, but say that the Act does provide for the issuance of certificates when the Commission finds that the service is, or will be required by the present or future convenience and necessity as provided in the Act; and further allege that

the evidence adduced before the Commission, and here under review; established that the present and future convenience and necessity required operation by the applicant of a common motor carrier service between the points and to the extent set forth by the order of the Commission entered in this proceeding; refer the court to the Commission's report and order of June 1, 1959, for the complete and accurate reasons and basis for the grant of the certificate in question; and lastly, they say that the challenged orders of the Commission are lawful and in all respects valid and seek a decree that the relief prayed be denied, and the complaint and intervening complaints be dismissed.

ICC'S FINDINGS OF FACT.

All parties hereto agree to the findings of fact, one side of the litigants affirming these facts as justifying the orders, while the other deny that they do.

We are thus required to examine the facts and inquire, under those facts, whether or not there are substantial facts to either affirm or reject the respective orders under the applicable rules of law pertaining thereto.

The allegations of the complaint on which the plaintiff bases its right to relief, all adopted by the intervening plaintiffs, while stated in some fourteen allegations, when analyzed can be stated as based on one general proposition, namely, the questioned authority of the Commission to issue the certificate granted under the Commission's statutory power. All other asserted propositions are urged as a basis for the denial of this power.

SCOPE OF JUDICIAL REVIEW.

We are presented at the outset with the scope of judicial review of orders of the Interstate Commerce Commission. The Supreme Court, in a long line of decisions, has consistently held that orders of the Commission should not

be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings and are supported by substantial evidence, even though the court might reach a different conclusion on the facts presented.

This principle is clearly enunciated in *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547-548; 56 L. Ed. 308, 311; 32 S. Ct. 108, wherein the Court said:

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power (citing cases).

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent. v. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that

its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-87; *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 146. The Commission's judgment is to be exercised in the light of each individual case. The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or inconsistency of decisions which it has rendered. *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663-66; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271.

In *Virginian Ry. v. United States*, 272 U. S. 658, the Court said (pp. 665-666):

• • • This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

Unless there is clear evidence to the contrary, it must be presumed that the Commission has properly performed its official duties; and this presumption supports its official acts. *United States v. Chemical Foundation*, 272 U. S. 1; *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602.

The National Transportation Policy of Sept. 18, 1940 (49 U. S. C., preceding Sections 1, 301, 901, and 1001), provides:

It is hereby declared to be the national transporta-

tion policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve, the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)) provides in part as follows:

Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *

HISTORY OF PROCEEDING.

The admitted facts establish that Nebraska Short Line Carriers, Inc., is a corporation organized under Nebraska law on June 14, 1956, with authority to issue 1,000 shares of common and 500 shares of preferred stock at \$100 per share; that at hearing time \$37,500 of common stock had been issued and held in varying amounts by Romans Motor Freight and other Nebraska intra-state carriers, the officers and owners of which were experienced men and companies in the transportation business of motor common carriers, and all of whom had certificates of convenience and necessity, either from the Nebraska State Railway Commission for intrastate commerce or from Interstate Commerce Commission for interstate traffic movements. All carriers and individual owners holding stock in Nebraska Short Line Carriers, Inc., are non-union motor carriers and operate wholly within certain points in Nebraska. The Nebraska intra-state carriers are Romans Motor Freight, Clark Bros. Transfer, Lyon Transfer, McKay Freight Line, Winter Bros., Abler Transfer, Inc., Fremont Express Co., Superior Transfer, Pawnee Transfer, Derickson Transfer, Steffy's Transfer, Crete and Wilber Freight Lines, and Tillman Transfer Company. The President of applicant is John Romans, the Vice-President is C. C. McKay, the Secretary, Walter F. Clark, and the Treasurer, Royal F. Lyon, and who, with Leonard Abler, constitute the Board of Directors. Most of the stockholding truckers are authorized to transport general commodities with exceptions between certain points in eastern and central Nebraska, including Omaha and Lincoln, and between Grand Island and North Platte. Collectively they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration. The traffic manager was able to secure terminal facilities at Chicago, St. Louis, Kansas

City, Minneapolis and Denver, and found that drivers and plenty of motor vehicles could be procured for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease equipment from its stockholders or other motor carriers. The applicant, if granted authority, proposes to serve the public generally and its general manager indicated that no discrimination would be shown in selecting carriers for traffic interchange.

On January 26, 1957, applicant had total assets of \$32,785; liabilities of \$467; and net worth of \$32,318. By order entered Dec. 4, 1956, temporary authority to applicant was approved upon meeting certain requirements.

In May, 1956, the stockholders, under their carrier rights, began to experience difficulties at Omaha, Lincoln and Grand Island, Nebraska, in respect to interstate traffic normally interchanged at those points with certain motor carriers. Romans was informed in Omaha, by an official of Independent, that the latter carrier was risking labor trouble with its employees, who are members of Teamster's Union, if normal interchange between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956, were not accepted by that carrier. These shipments were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it did not do so in every instance. Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grand Island, particularly with Red Ball and Watson. Time is consumed in finding motor carriers willing to accept traffic, and Romans' operation are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and

Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application, and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made particularly to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Burlington has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight decreased in 1956 compared to 1955 volume. His gross revenue in 1956 was \$138,775, as against \$159,280 in 1955. Prior to May, 1956, 30 per cent of his traffic consisted of outbound shipments, and 70 per cent was inbound. Presently most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, taken over by Interstate Motor Freight System, Inc., Red Ball, Ringsby, Santa Fe Trail, Watson, Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl Express, Inc., Ideal Truck Line, Iowa-Nebraska Transportation Company, Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company, Wright Motor Freight Lines, now B-C Cartage, D. M. T., Haeckl, Ideal, I. N. T., McMaken, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson and Wright, respectively. These were most of the major motor carriers with whom interchange was affected (sic). After the approximate date of May 7, 1956, these

truck lines would not tender or accept freight from Romans at certain times, and this has continued. Interchange between Romans and Burlington, Santa Fe Trail and Rock Island has continued. Ringsby has also accepted freight.

Romans is non-union. There have been no strikes by his employees, nor have any pickets been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk, Nebraska. It serves Sioux City, Iowa, as well as Omaha. No terminal facilities have been operated by this carrier at Sioux City since March 15, 1956, when certain unionized connecting carriers serving that point discontinued normal interchange operations with him. Shortly thereafter the discontinuance of normal interchange began at Omaha by most of the carriers with whom he interlined freight. Burlington and Santa Fe continued to interchange traffic and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Stum. In June, 1955, at both Sioux City and Omaha, he interchanged 400 shipments with Watson. This dropped to nothing in 1956. In June, 1955, at the same two points, he received from 300 to 500 shipments from Freightways, and in June, 1956, he interchanged about 5 shipments with this carrier. In the first nine months of 1956, his gross revenue, including interstate and intrastate was \$70,000 less than that for the corresponding period of 1955. He was approached by union representatives, beginning in August, 1955, relative to signing a contract. He was advised by one union representative that a drive was on for memberships in Nebraska and that non-union motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebraska. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of

Omaha and Lincoln. On April 17, 1956, a large number of motor carriers discontinued normal interchange with him at Lincoln and Omaha. In 1955 at these points he received 1215 interstate shipments by interline from other motor carriers, and in 1956 received only 210. Gross revenue of \$205,000 in 1955 dropped to \$156,000 in 1956. On some occasions his driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers' terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with him.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals \$60,000, and forty per cent is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa and Crete, Nebraska.

Tillman operates between Fremont and Lincoln. In 1956, this carrier grossed about \$47,000. Ten per cent of it comes from interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball and McKay.

Peters operates daily between Omaha and Fremont, and transports some interstate traffic between these points. At time of hearing he was still interchanging traffic with Prucka, Burlington and I. N. T. He still interchanges freight now and then with certain other motor carriers, but not as frequent as formerly. Merchants, for example, before April, 1956, gave him a substantial amount of traffic, but after that time very little. Also, certain traffic which he had received from Independent was given to Joe Ray Freight Line. Most of his present interstate traffic consists of shipments received in Omaha from National Car Loading Company for delivery to Fremont. He grossed about \$20,800 in 1956, which compares favorably

with other years, and about 85 per cent of this revenue was derived from interstate business.

Derickson operates daily over U. S. Route 30 between Grand Island and North Platte, and interlines traffic at those points with various motor carriers without difficulty. Numerous consignees route their traffic for ultimate delivery over his line. His competitors over this route consider his service adequate.

Steffy operates over routes between Omaha and Creston, Nebraska, and between Dodge, Nebraska and Sioux City, Iowa. Some of his points on and near Nebraska Highway 91, east of Creston, are not served by any other carrier. It interchanges traffic at Omaha with various motor carriers. Its profit in 1955 amounted to about \$6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh and Central City. He serves about 30 Nebraska points regularly and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters Local No. 554 to sign a contract. He inquired whether the Union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the Union to induce Lyon to sign a contract and when these attempts failed, normal interchange ceased at Omaha on March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a

regular basis, viz., Box Truck Lines, Inc., Burlington, Ringsby, D. M. T., and National Carloading. Prucka tendered some freight to Lyon during the last week of January 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments, but there have been instances when Lyon has not been given freight by these carriers which was routed over his line. There have been no strikes or labor disputes on Lyon's line, and no pickets were established at his place of business.

Winter operates between Omaha and Lincoln. His interstate traffic is small.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln, Lincoln to Beatrice, and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings, Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route, but these operations can be connected by the use of certain irregular route authority.

Clark operates over regular routes between Omaha, Lincoln and Sioux City, Iowa, on the one hand, and on the other, numerous points in northeastern Nebraska, including Fremont, Norfolk, Neligh, Grand Island, Newman Grove and Madison, it serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its traffic at Omaha and some at Lincoln. About 90 per cent of its traffic is transported between Omaha and Norfolk. In 1955 Clark grossed \$286,346; 40 per cent from interstate, and 60 per cent from intrastate traffic. In 1956 gross revenue was \$217,412; 4

per cent from interstate and 96 per cent from intrastate. Prior to September, 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955, representatives of Teamsters; (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955, a picket line was placed at Clark's Omaha terminal. Thereafter deliveries of interchange traffic to this terminal ceased generally. Clark did, where possible, deliver out-bound interchange shipments to connecting carriers. On Oct. 1, 1955, Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board. This action culminated in a settlement agreement on Dec. 7, 1955, by representatives of Local 554, Fred L. Clark, and a representative of N. L. R. B. The agreement was approved by the Regional Director of N. L. R. B. Among other things, the agreement provided for the posting of a notice at the business office of Local 554 at Omaha, which in effect stated that the Union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D. M. T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials or commodities, or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark, or to force or require Clark to recognize or bargain with the Union as the collective bargaining representative in accordance with the provisions of Section 9, of N. L. R. B. Act. This notice was placed also at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers

was resumed for a while until Clark's interline business dropped noticeably after Jan. 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington and Wilson. Pickets, however, remained at Clark's terminal and were still there in March, 1956, including one of Clark's former employees (employed prior to Sept. 14, 1955). No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On Sept. 14, 1955, he had seven employees.

The Union activity was such that Clark sought relief from National Labor Relations Board, which Board applied for and obtained a temporary restraining order in United States District Court for Nebraska. The order of the Court, pending final determination of the matter before the Board, was calculated to enjoin picketing at the premises of various motor carriers and shippers who did business with Clark, and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where with Clark or to force or require Clark to recognize or bargain with Teamsters or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters, etc., was certified as the representative of said employees in accordance with Section 9 of National Labor Relations Act. Thereafter Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances were shown where D. M. T., Haeckel, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark

found that the traffic was accepted in some instances and refused at other times. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments. On Dec. 26, 1956, the N. L. R. B. in the proceedings involving Clark and the Union, entered an order requiring Teamsters Local No. 554 to cease and desist from certain unfair labor practices in violation of the National Labor Relations Act.

Generally the stockholders of applicant, with the exception of Clark, have had no dispute with their employees. They are parties to certain tariffs published by rate bureaus and have executed concurrences for the interchange of freight on through routes and through rates with various connecting motor carriers, including protesting motor carriers who are also parties to the published tariffs. They hold themselves out to transport interstate freight on a through route rate basis.

Shippers from some fourteen towns and cities in Nebraska supported the application. Shipments of drugs requiring expeditious delivery under refrigeration were delayed; rush order shipments of automotive parts were delayed. The same is true of clothing and drug shipments, butter shipments of the value of \$18,000 to Chicago from a butter factory at Burwell, Nebraska, shipments of leather, newspapers, magazines, catalogues, advertising material, repair parts for farm machinery, truckload shipments of butter from Newman Grove, Nebraska, department store products, hardware store products and farm machinery parts from Sargent, Nebraska, hardware store supplies at Pierce, Nebraska, petroleum products, tires and accessories at Tilden, Nebraska, truck parts at Loup City, Nebraska, emergency shipments of auto parts at Neligh, Nebraska, tire shipments, seed, outboard motors, boats, marine hardware, plumbing fixtures, water softeners and related supplies, heating and air conditioning equipment,

and dairy products from Kansas City, Chicago, Des Moines and St. Louis to Norfolk, Nebraska, raw materials for the manufacture of farm and industrial equipment, including corn cribs, grain bins, crop-drying machines and power steering devices from Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Illinois and Hammond, Indiana, to Columbus, Nebraska, products for a chain organization located at Fairbury, Nebraska, receiving a wide range of commodities from Minneapolis, Chicago, Kansas City and St. Louis, wallpaper, floor coverings and other merchandise from St. Louis, Chicago, Lyons and Joliet, Illinois, Kansas City, Minneapolis, St. Paul and Des Moines, Iowa to Fairbury, Nebraska, pump jacks, cylinders, water supply equipment, windmills and plumbing supplies from various scattered centers over the middlewestern and rocky mountain states to Fairbury, Nebraska, drugs, department store commodities for Lincoln, Nebraska, heating and air conditioning equipment, various manufactured products, including frames for upholstered furniture, cabinets and television set bases, products for storage in two large warehouses, including products from large tobacco manufacturers and packing houses to, from and into Omaha from various centers over the country. The record is replete with delays, unnecessary tracing of shipments, inconveniences and losses, all because a former owner of Independent, testified that his Company, as a result of the fact that Romans had a labor dispute because his employees refused to be organized, was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it, that was their own responsibility."

The record further shows that Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through

or to this centrally located city. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union.

HOT CARGO CLAUSE.

The Teamster contracts include what is known as a hot cargo clause, providing as follows:

It shall not be a violation of this Agreement, and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs, or lockouts exist.

The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help affect a fair settlement.

The Union shall give the Employer notice of all strikes and/or the intent of the Union to call a strike

Appendix.

of any Employer and/or place of business, and/or intent of the members, to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the possession of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier.

The insistence by any employer that his employee handle unfair goods, or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such employer's operations without any need of the Union to go through the grievance procedure herein.

NATURE OF INTERCHANGE OPERATIONS.

The plaintiffs and intervening plaintiffs' carriers are large trunk line carriers, carrying freight from the entire country to the port of Omaha, and receive and interchange freight at this location from smaller carriers who operate in eastern Nebraska, in joint tariff operations. These smaller carriers use Omaha as a principal or important interchange point, and carry outgoing freight from and deliver incoming freight to a very large number of Nebraska communities. Carriage by motor freight lines furnishes the transportation facilities for most of these communities, and their normal existence depends on the uninterrupted flow of motor carriage of goods to their stores and factories. These Nebraska carriers, while smaller in the scope of their operations, adequately serve these Nebraska communities. These carriers are non-unionized.

As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in these Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Adler, were not approached until early 1956. The record shows that the Union was not very successful; that in most cases the employees did not respond, and that in every instance the carriers were more than reluctant to accept unionization.

The Union, having no satisfactory success in the Eastern Nebraska field, apparently and very probably started at the other end and began to work through the unionized carriers and put the pressure indirectly on the Eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln and Grand Island.

While some trunkline carriers did not freely admit that their interchange practices after May, 1956, had been materially different from earlier practices, some others freely admitted that they had not been able to interchange with Eastern Nebraska carriers in the same free and open way they interchanged prior to 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May, 1956, a deterioration in interchange relationships and a rise in interchange difficulties. These conclusions are heavily confirmed by the testimony and exhibits shown in this record, and no one can seriously contend that the evidence of the Nebraska carriers was not founded on actual experience. The atti-

tudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others, and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe, accepted almost all traffic offered. But even these carriers did not maintain the same free and open interchange practices in effect before May, 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not normally provide acceptable service for much or most of the traffic which these Eastern Nebraska carriers would normally have handled.

The record shows beyond doubt that so far as those Eastern Nebraska carriers were concerned, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May, 1956. And there can be no doubt that, as a direct result, these Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers, thereby causing a breakdown of service to the public. These matters have been recited above showing inconveniences, delays, loss of interstate revenues, failure of adequate service to the public, etc., all assertedly because of union pressure.

The Nebraska carriers, faced with these problems, got together and formed applicant corporation. The principal purpose of this corporation is that, as a carrier based at Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond. The applicant has no policy on unionization, but it does have a firm policy to the effect that, under no conditions,

would it ever agree to a union contract containing any hot cargo provisions.

The plea of plaintiff and intervening plaintiffs is that they have large investments in their operations, such as terminals, carriage equipment, and the like. There is likewise no doubt that their ability to perform service prior to May 1957 was adequate. The record shows that because of union pressure it was inadequate after that time, and they seek to justify it on the hot cargo clauses of their contracts with Teamsters Union. Essentially it sounds in confession and avoidance, basing their avoidance on a so-called hot cargo provision in a union contract. Nevertheless, from the examples cited in the record, Clark, in two years of operations, lost heavily. Its interstate traffic fell from 30 per cent of its total traffic in 1954, to 4 per cent in 1956. Two related shipper companies, referred to as Charadon, manufacture furniture. Sales are made in 29 states. Raw materials and supplies are received from one to several points in 23 states. The yearly volume averages 3 million pounds out, and 3.5 million pounds in. Truck service is used for 75 per cent of the outbound, and 40 to 50 per cent of the inbound. These companies had labor difficulties, and as a result had difficulty in getting trucking service for its in and out freight. These companies have been using applicant's temporary service. The Ford Storage and Moving Company and Ford Brothers have two warehouses at Omaha and one at Council Bluffs, Iowa. One principal function is to provide storage for all classes of merchandise. They normally have heavy movements of freight both in and out. From 1952 through 1956 the inbound volume ranged from the equivalent of 575 to 779 carloads. Inbound traffic originates at Chicago, Illinois; Durham, North Carolina; Cincinnati, Ohio; Sioux Falls, South Dakota; and Beloit, Wisconsin. Destinations of outbound traffic are principally

Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming and Colorado. On inbound traffic rail service has been heavily used, but there has been a growing tendency toward motor truck service. By early 1956, about 60 per cent of the volume was coming in by truck. On outbound traffic, truck service is more extensively used. Normally the shippers control inbound traffic and these companies control outbound traffic. Everything in transportation was all right there until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of the hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses, and some would not do business with these companies. In addition to the inconveniences and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All these transportation problems came directly or indirectly from labor difficulties with others which Teamsters Union supported indirectly through refusal of their members who are employees of various truck carriers to cross picket lines, although not involved in labor troubles with Truckers Union. These companies admit that prior to 1956, the truck service was satisfactory, but they support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored they would still favor applicant's service.

The Broyhill Company, operating a plant at Dakota

City for the manufacture of farm equipment, also supported the applicant. Its gross sales in 1956 ran between seven and eight hundred thousand dollars, and greater anticipated sales in 1957. Raw materials come from a number of points spread throughout 20 states. Rail service is used rather extensively on the bulkier inbound commodities, but far less extensively on the outbound traffic. About 60 per cent of outbound traffic moves in truckload lots. About 80 per cent is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of the steel union went on strike and set up picket lines. As a result of the picket lines there have been no pickup or delivery service at the plant since the line appeared. It admits that it had no transportation problem prior to March 14, 1957, and that its service has been generally satisfactory. It nevertheless supports this application upon the theory that there could be no guarantee that it would not have another strike.

LABOR PRESSURE.

These examples of shipper experience are cited to show that there were breakdowns in service because of the failure of trucking companies to serve the public through hot cargo clauses in their contracts. The trucking companies have no grievances with shippers, but because they have labor contracts with their own employees and the unions to which they belong, they take the attitude that their own labor relations should be first served to the damage and injury of the shipping public to which they owe an almost absolute duty to serve under their certificates of convenience and necessity as granted by the Interstate Commerce Commission.

There is no question about carriage by rail. It has always been adequate. The trunkline motor carriers, as a whole, have always been able to provide service to Omaha.

Were it not for the effects of union pressure upon these carriers there would have been no material problem. The origin of the problem is in labor pressure. However this may be, these carriers owe a duty to the public to accept traffic irrespective of labor pressure.

ORGANIZATION OF APPLICANT.

The Commission found that applicant was organized as a means of combatting a labor situation arising in the Spring of 1956 which threatened to deprive the Nebraska carriers of much of the interstate traffic which they, before that date, had been handling, and in fact to drive them out of business entirely; that for several years the Nebraska carriers have resisted all attempts on the part of the Teamsters Union to organize their employees; that notwithstanding the almost complete lack, on the part of their employees, for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top"; that is organizational effort should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a union shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. Their purpose was to accomplish their end by declaring Nebraska carriers "unfair," and the institution of a secondary boycott against their traffic on the part of the larger unionized carriers with which Nebraska carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to so-called "protection of rights," or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide gen-

erally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union, or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is involved in any controversy with a union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exist. The clause is quoted above.

Also that applicant, irrespective of picket lines or other labor difficulties at plants and factories, proposes to render free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring service, regardless of picket lines.

EFFECTS OF BOYCOTT.

The Commission found that at no time has the boycott against Nebraska carriers been completely effective in that at no time has the interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from Nebraska carriers more or less regularly when offered, and to have generally maintained normal interline relationships with them. Certain others of the larger unionized carriers have accepted interline freight at times, and refused at other times. Most outbound interline traffic appears to have been disposed of by Nebraska carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the Nebraska carriers and substantial delays in the movement of freight. On inbound traffic, shipper routing instructions have been generally ignored, and much

of the interline business previously enjoyed by certain Nebraska carriers and turned over to them for ultimate delivery to points on their lines, have been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience and added expense to shippers. The latter stems from the fact that there are no joint rates published for motor-rail movements through Omaha. On the other hand, Nebraska carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all motor traffic moving to and from Nebraska points through Omaha.

EXAMINER'S RECOMMENDATIONS: CARRIER EXCEPTIONS.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application be denied. In so doing, he suggested that an application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through peaceful union picket lines, amount to service deficiencies and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which

is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

REPLIES TO EXCEPTIONS.

In their replies to the exceptions the opposing carriers and the Union argue generally that the conclusions of the examiner are in accordance with the law and the facts, and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented, or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the additional motor carrier service proposed, and that it is fit and able properly to conduct an operation of the scope involved.

COMMISSION DECISION.

On June 1, 1959, the Commission, under the facts as herein set out, disagreed with the examiner's conclusions and found unanimously:

"In a situation as here presented, there arises a

question as to the proper procedure to secure corrective action. We do not agree with those who insist that the procedure here adopted, . . . the filing of the instant application under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in a service available to a large section of the public, one effective method of correcting the situation is by granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers, does not alter the situation or deprive any carrier of the right to follow the course here chosen . . . that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Neb., and Chicago, Ill., . . . and return . . . and (2) between Omaha and St. Louis, Mo., from Omaha . . . to Kansas City, Mo. . . . to St. Louis, Mo., and return over the same route . . . serving the intermediate point of Kansas City . . . restricted in each instance, to traffic originating at or destined to points in Nebraska."

ICC EXPERTISE.

The Courts, in numerous decisions, have held that the Commission has a broad discretion in determining the issue of public convenience and necessity under Section 207(a) of the Interstate Commerce Act, and the pertinent portion of the order exercising this discretion has been quoted above. This issue is a matter requiring the exercise of the Commission's expert judgment in the field of transportation. *New York Central Securities Co. v. United States*, 287 U. S. 12, 25; *United States v. Carolina Freight Carriers Corporation*, 13 Federal Carriers Cases ¶80,023, 315 U. S. 475, 482, 490. In the exercise of this administrative function there are no specifications of consideration by which the Commission is to be governed in determining whether or not public convenience and necessity requires the inauguration of motor carrier service. We point out that this record shows, with abundant evidence, that a deficiency in service to the shipping public of Nebraska continued for over a period of two years because of transportation refusals, disregard of routings, routings by carrier and rail where no joint truck-rail rates were in existence, more expense to shippers, etc., all because of economic and labor pressure on the transportation companies involved. We also point out here that plaintiff, Burlington Truck Lines, Inc., and certain other transportation companies who continued to interchange and accept freight from the Nebraska carriers, will not be affected by this order. Their business has continued, but because of the fact, either that their transportation facilities were unable to solve the problem when considered in the overall picture, or because of the refusal of many other transportation companies to render the required service, caused the conditions to exist, is a matter for the Commission, in its discretion, to decide. These carriers have interchanged

freight from and to Nebraska points during the entire period that applicant has served under its limited temporary authority, and it is reasonable to assume that such interchange will continue in the future. If it does not continue, and even though the resulting competition causes a decrease in revenue to some of the transportation companies, the privilege granted to operate truck lines is in no sense the grant of a monopoly. This is particularly emphasized under Section 207(b) (49 U. S. C. 307(b)), which provides in substance that any certificate issued shall not confer any proprietary or property rights in the use of the public highways. There is no immunity against future competition. The record shows that the Commission considered the nature of the service rendered by plaintiff and Santa Fe during the period.

The plaintiffs argue that since Burlington and Santa Fe generally maintained normal interline relations during the period in question, and since some of the other plaintiff carriers accepted interline traffic at times, the Commission was not warranted in granting a certificate to the applicant. Although the Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) took note of these facts, it nevertheless found that the public convenience and necessity required the operation of the applicant. Therefore, the Commission, in reaching its conclusions, took into consideration such service as those carriers continued to render during the period involved, but after weighing the evidence approved the application. Regarding this phase of the case, the Commission had this to say in its report (79 M. C. C. 599, 603):

“At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have ac-

cepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and non-scheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha."

This is a finding of fact, with all other facts as hereinabove related, and as found by the Commission, constitute the basis on which the Commission entered its order.

DISCRETION OF ADMINISTRATIVE BODY.

The Commission is vested with administrative authority "to draw its conclusions from the infinite variety of circumstances which may occur in specific instances." This is necessarily true since it is the "present or future public convenience and necessity" which the Commission must determine. While it is difficult to forecast future needs, yet the best and safest assurance in all instances is to anticipate what they might be and attempt to meet them. In order to

provide required transportation services as the demands arise, the Commission must exercise a prophetic vision. It cannot stand idly by and wait until the actual needs are present, but must foresee and take proper steps to meet them. Future need is an uncertainty in all instances. The best assurance of an accurate forecast is the considered judgment of the "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454. The adequacy of the existing facilities is not the absolute criterion by which the Commission's action must be guided.

In *Norfolk Southern Bus. Corp. v. United States* [7 Federal Carriers Cases ¶ 80,597], 96 F. Supp. 756, 760, Judge Dobie said:

"There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer & Storage Co. v. United States* [3 Federal Carriers Cases ¶ 80,021], DC-Pa. 42 F. Supp. 215, affirmed, (42) 317 U. S. 587; *A. B. & C. Motor Trans. Co. v. U. S.* [6 Federal Carriers Cases ¶ 80,376], DC-Mass., (46) 69 F. Supp. 166, 169. Section 207(b) of the Interstate Commerce Act, 49 U. S. C. A. 307(b) stated: 'No certificate under this chapter shall confer any proprietary or property rights in the use of the public highways.'"

"Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See *Chesapeake & Ohio Ry. Co. v. United States*, 283 U. S. 35; *North Coast Transp. Co. v. United States*, 283 U. S. 35; *North Coast Transp. Co. v. United States* [4 Federal Carriers Cases ¶ 80,144], D. C. 54 F. Supp. 448, 451 affirmed 323 U. S. 668. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. *Lang Transp. Corp. v. United States* [6 Federal Carriers Cases ¶ 80,477], D. C., 75 F. Supp. 915, 929; *Inland*

Motor Freight Lines v. United States [2 Federal Carriers Cases ¶ 9583], D. C., 36 F. Supp. 885.

"As circuit judge Parker stated in *Beard-Lancy v. United States* [7 Federal Carriers Cases ¶ 80,539], D. C. 83 F. Supp. 27, 32, affirmed 338 U. S. 803: 'It is for the Commission, not the Court, to say what public convenience and necessity requires, and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities.'"

Moreover, in determining the question of public convenience and necessity the responsibility is that of the Commission and not that of the hearing examiner. Thus, the recommended finding of the hearing examiner that the application should be denied is not binding on the Commission. *Radio Comm. v. Nelson Bros.*, 289 U. S. 266, 285; *Interstate Commerce Commission v. Martin Bros. Box Co.*, 249 F. 2d 811, 812, cert. den., 350 U. S. 823; *Carolina Scenic Coach Co. v. United States* [4 Federal Carriers Cases ¶ 80,188], 56 F. Supp. 801, 805, affirmed 323 U. S. 678; *C. E. Hall & Sons v. United States* [7 Federal Carriers Cases ¶ 80,587], 88 F. Supp. 596, 598; *Inter-City Transp. Co. v. United States*, 89 F. Supp. 441, 445; *Norfolk Sou. Bus Corp. v. United States* [*supra*], 96 F. Supp. 756, 658, affirmed, 340 U. S. 802; *Illinois California Express, Inc., et al. v. United States*, [12 Federal Carriers Cases ¶ 81,183]. Under the Interstate Commerce Act, the final grant or denial of applications for operating authority is to be determined by the Commission, not by the hearing examiner.

Plaintiffs allege in their complaints "that Nebraska Short Line Carriers, Inc., failed to prove or establish by clear and convincing evidence that the public could not be or was not being served adequately by existing carriers." Plaintiffs also allege "that the decision of the Interstate Commerce Commission is based solely and entirely upon

allegations that certain shippers were unable to obtain transportation services from some carriers . . . during the period in question."

Complainants' attack in this regard appears to be directed primarily at the conclusion reached by the Commission upon the evidence. In other words, it seems that the complainants feel that the Court should weigh the evidence and reach a different conclusion from that reached by the Commission.

The considerations of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone to decide. *Alton R. Co. v. United States* [3 Federal Carriers Cases ¶ 80,013], 315 U. S. 15, 23; *United States v. Pan-American Petroleum Corp.* [1 Federal Carriers Cases ¶ 9518], 304 U. S. 156, 158; *United States v. Detroit Navigation Co.* [5 Federal Carriers Cases ¶ 80,256], 326 U. S. 236, 241; *United States v. Pierce Auto Freight Lines, Inc.* [5 Federal Carriers Cases ¶ 80,281], 327 U. S. 515, 535.

In *Riss and Co., Inc. v. United States* [8 Federal Carriers Cases ¶ 80,729], 100 F. Supp. 468, affirmed 342 U. S. 937, rehearing denied 343 U. S. 937, the lower court said, (p. 483):

"The Commission is the fact-finding body. The court does not make findings of fact, but simply determines whether or not the Commission's findings are supported by substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its findings, if there is substantial evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the

Commission, any more than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury."

In *Virginian Ry. v. United States* [*supra*], 272 U. S. 658, 663, 665-666, the Supreme Court said:

"* * * To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province * * * This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it * * *"

ISSUE.

The issue before the Court is simply whether there is rational basis for the Commission's findings. It is not whether this Court may have reached different findings on the record made.

SUPPORTING EVIDENCE.

The hearing before the Commission consumed 19 days. The transcript of the evidence from the 75 witnesses who gave testimony consists of 2,886 pages, and there are about 175 exhibits, and we have read and studied the examiner's reports in which the evidence has been detailed and which both sides of this litigation concede to be fairly and accurately stated and from which the Commission found that there was no serious dispute as to the facts.

In the two cases pointed out by plaintiff, namely, *H. D. Filson v. Interstate Commerce Commission and United States of America et al.* [14 Federal Carriers Cases ¶ 81,316], 182 F. Supp. 675, and *Hudson Transit Lines, Inc. v. United States* [6 Federal Carriers Cases ¶ 80,503], 82 F.

Supp. 153, affirmed *per curiam* ('49) 338 U. S. 802, as sustaining its position and contentions for reversal of the Commission's order, it is pertinent to point out that both cases sustained the orders of the Commission, refusing to grant authorization for the new service. In these cases the Commission, under the evidence, found that the existing service was adequate and refused to grant the applications sought, because of failure of proof that public convenience and necessity required the new service and failed to show inadequacy of the existing service. In the latter case the Court does point out that "inadequacy of existing facilities is a basic ingredient in the determination of public 'necessity' ", and it does not mean "that the holder of a certificate is entitled to immunity from competition under any and all circumstances", and that the "introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service."

In the opinion of this Court, we find and hold that the order of the Commission is supported by substantial evidence that the service of the existing carriers, under the circumstances here involved, was inadequate, and that the proof in the record shows that the competitive service as here granted is in the public interest.

JURISDICTION OF LABOR DISPUTE.

Another question argued in support of the complaint is that there was a labor dispute which the Commission had no power to adjudicate, the plaintiff asserting that the matter should be presented to the National Labor Relations Board, under the provisions of the National Labor Relations Act. There is no labor dispute between any employer or employee here. The only labor dispute of which the National Labor Relations Board had jurisdiction to

assume was that of Clark, and he did take his matter before that Board and had it adjudicated. As a result of his efforts the Board sought and procured injunctive relief in his behalf. It is rather pressure brought to bear on the Transportation Companies here involved by the labor union to force upon the Nebraska carriers a union shop contract, when the labor union was unable under the law to secure recognition by the Nebraska carriers by reason of their employees refusing to accept the labor union as their bargaining agent. The transportation companies more or less went along with this labor union, and did not require their employees to perform the service that these transportation companies were required to render under their certificates of convenience and necessity. They thus find themselves, by reason of their inaction, faced by public demand for additional and other service.

The plaintiffs allege in their complaints that the Commission misconceived the purpose and intention of Congress in Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)), which authorizes the grant of motor carrier certificates; that the Commission does not have jurisdiction to deal with labor disputes, or "to remedy alleged problems which arise as a result of labor disputes"; and that Section 212 of the Interstate Commerce Act (49 U. S. C. 312) "is the only remedy provided by said Act for wilful breaches of duty by interstate carriers", and that said Act "does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty to existing carriers alleged to have violated their duty to the public".

It is true that the Commission does not have jurisdiction to consider the legality or propriety of agreements between motor carriers and labor organization affecting labor relations between employers and employees, or to adjudicate labor disputes or controversies, but the Com-

mission, under the provisions of the Interstate Commerce Act, is concerned with, and has jurisdiction over, the actions of common carriers in relation to their obligations to the public under that Act. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, the Commission has both power and duty to authorize such additional motor carrier service as may be necessary to carry out the purposes of the national transportation policy. It is also true that the Interstate Commerce Act does not contemplate or provide for the issuance of certificates of public convenience and necessity as a penalty, but said Act does provide for the issuance of such certificates when the Commission finds that the proposed service is, or will be, required by the present or future public convenience and necessity as set forth in the Act.

The Commission, in its report in the proceeding here under review (79 M. C. C. 599) had this to say on that subject:

"We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The Act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and they are obligated to

accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations."

The plaintiffs and intervening plaintiff contend that instead of seeking motor carrier authority to serve the area involved the aggrieved parties should have filed complaints with the Interstate Commerce Commission or the National Labor Relations Board, and that the grant of a motor carrier certificate to the applicant constituted a penalty upon the plaintiff carriers which the Commission had no legal authority to impose.

These same arguments were made before the Commission in the proceeding under review, but were properly rejected as wholly without merit.

The Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599), fully disposed of these contentions by stating (pp. 612-613):

"In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely, the filing of the instant applications under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situa-

tion is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen."

NEED FOR SERVICE.

Section 207 of the Interstate Commerce Act, directs the Commission, in determining applications for motor carrier certificates of public convenience and necessity, to consider both the present and future public convenience and necessity. In hearing and determining such applications, the Commission often finds that coincident with the filing of an application, existing motor carriers start to provide or offer to provide better service to more shippers. Obviously, the Commission is not required to give decisive weight to such a belated zeal to serve the public. Similarly, where existing carriers have gone so far as to subordinate their statutory common carrier service obligations to "hot cargo" clauses, the Commission, in determining the present and future public convenience and necessity, is not required to give controlling weight to a belated cessation of such conduct. It is equally obvious that in determining the public need for service between such major centers as Omaha, on the one hand, and Chicago, St. Louis and Kansas City, the fact that some of the existing carriers provided some of the needed service does not preclude authorization of additional service to insure continuous and sufficient service for all shippers.

Congress has provided limited or qualified monopolies for interstate motor common carriers on the theory that ultimately the public will receive more efficient and more

economical service. Conversely, Congress did not abandon free entry into interstate motor transportation, with its inherent safeguard of unrestricted competition, merely to protect a few authorized carriers in serving shippers with large amounts of profitable traffic, or as here, shippers and connecting carriers who have not been "blackballed" by the union with which such carriers have collective bargaining agreements. Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service.

It may be that in most cases where there has been a showing that existing motor carrier service has been inadequate, the Commission could proceed to compel the existing carriers to render adequate service to the shipping public. However, Congress has not limited the Commission to such an approach, and, in hundreds of cases, the Commission has responded to a showing of inadequate service by authorizing a new competitive service. The latter approach both conserves the Commission's regulatory resources and utilizes the beneficial forces of competition. We are aware of no basis for precluding the latter approach to the problem of inadequate service to the public where such inadequacy is created by existing carriers subordinating their public service obligations to their collective bargaining agreements.

JUSTIFICATION IN REFUSING TO INTERCHANGE.

In support of their position, the plaintiff carriers argue that they were justified in refusing to interchange shipments with other carriers and in refusing to pick up and deliver goods for shippers under the "hot cargo" clauses in their labor contracts. As will be seen from the decisions discussed below there is no merit in this contention.

The Supreme Court in its decision in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L. v. National Labor Relations Board*, 357 U. S. 93, stated:

“Since the Genuine Parts decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.* [12 Federal Carriers Cases ¶ 34,179], 73 M. C. C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods

of a shipper. Since he cannot effectively consent, there is, under Sec. 8(b)(4)(A), a 'strike or concerted refusal', and a 'forcing or requiring' of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a 'strike or concerted refusal,' or a 'forcing or requiring' of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner proscribed by Sec. 8(b)(4)(A). Common factors may emerge in the adjudication of these questions involving independent considerations. This is made clear by a situation in which the carrier has freely agreed with the union to engage in a boycott. He may have failed in his obligations under the Interstate Commerce Act, but there clearly is no violation of Sec. 8(b)(4)(A); there has been no prohibited inducement of employees."

In *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Railway Co.*, D. C. 105 F. Supp. 794, affirmed 215 F. 2d 126, the Court held that the railroad defendant was not relieved of its duty to furnish cars to a shipper because of a strike at the latter's plant. The Court had this to say (p. 802):

"The undeniable fact is that the railroad company took no affirmative steps whatsoever to comply with its duty as a common carrier, and did nothing to insist

and demand that the strikers should not interfere with the performance of that duty . . . Instead of attempting to obey the law of the land, the defendant assumed to consider the wishes and the demands of the striking Union as being paramount. To condone defendant's failure to perform its statutory duty under this evidence would be tantamount to recognition that mob rule had supplanted law and order in this community."

Other cases to the same effect are *Erie Railroad Co. v. Local 1286*, 117 F. Supp. 157; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* [10 Federal Carriers Cases ¶ 80,879], 128 F. Supp. 475, 498; *Consolidated Freight Lines, Inc. v. Dept. of Public Service*, 200 Wash. 659; 94 Pac. 2d 484, 485; *Beck & Gregg Hardware Co. v. Cook* [10 Federal Carriers Cases ¶ 80,933], 82 S. E. 2d 4; *Burlington Transportation Co. et al. v. Hathaway*, 234 Iowa 135, 12 N. W. 2d 167.

In *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* [*supra*], 128 F. Supp. 475, 498-499, the Court said:

"The labor policy of the United States cannot be conceived to authorize setting aside obligations of others by illegal acts of unions or labor leaders. It cannot authorize violence or threats of violence, picket lines for political purposes, 'secondary' and 'tertiary' boycotts to isolate a single business from the facilities of commerce, or combinations of unions and labor leaders with business concerns such as the railroads and motor truck operators through their respective employees on the ground in line of duty to accomplish any such illegal purposes.

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"The holding out, whether by rail or motor carrier, was not and could not be legally conditioned by any contracts which any of the carriers may have had with its own employees. Working rules or principles within the economy of the carrier would not be permitted to modify its vital obligations. Inadequacy of preparation of any carrier to carry out its engagement for hire

made in the public interest might result in the surrender or cancellation of its franchise, but not in a modification of the fundamental duties. Any conditions of this sort would have been illegal.

"The rationale of this claim as to the limitation of the 'holding out' is that the carriers are released from these duties outlined above, since the acts and omissions were those of its own employees over which it had no control because the latter indicated a sympathetic disposition not to handle or transport Wards' shipments. If followed, this theory will revolutionize the present economic structure. A group of transportation employees can bring all the rail and motor systems to a standstill by refusing to transport articles destined for another country with which the group disagrees. The same ends can be obtained by a picket line dedicated to that end, which transportation workers will not cross. These are not theories, but pragmatic present day problems. Foreign policy, governmental action, political action and the extinction of private business can be controlled by collusive interaction of employees of carriers with outside and unconnected organizations.

"The contention, if adopted, would destroy the representation of the employer by his employees dealing with the public or individuals in another line of business. It would wipe out the corporate theory."

The Court, recognizing that its earlier opinion in the *Montgomery Ward* case (128 F. Supp. 475) had been subject "to much interpretation", rendered a clarifying opinion, stated (128 F. Supp. 520):

"The opinion, reduced to its lowest terms, held that each common carrier, whether trucker or railroad, has a duty at common law and under the Interstate Commerce Act, 49 U. S. C. A. 1 *et seq.*, to receive, transport and deliver goods in accordance with its holding out or the engagement of its posted tariff. This duty is almost absolute, since the carrier is excused only if performance is prevented by the act of God or the

public enemy. Because neither of these defenses was established, liability was found as to each defendant as to specific goods."

RIGHT TO REFUSE TENDERED SHIPMENTS.

It is clear, we think, from the foregoing decisions that labor disappointments such as those present here, do not constitute a valid excuse for motor carriers to refuse to pick up and deliver shipments tendered to them by shippers which are experiencing labor troubles and whose plants are picketed, or to refuse to interchange shipments with other carriers which are not unionized or are not engaged in labor controversies with their employees.

When existing motor carriers fail for any of these reasons to perform their duties and obligations to shippers and other carriers, the Commission is empowered and required to insure adequate motor carrier service through the authorization of additional and appropriate motor carrier certificates of public convenience and necessity, as was done here.

EFFECT OF SUBSEQUENT LEGISLATION.

The plaintiffs and plaintiff intervenors seek to have this Court set aside the Commission's order granting motor carrier authority to the applicant on the grounds that the plaintiff carriers have now resumed the motor carrier service which they discontinued in deference to union contracts and pressures, and that Congress subsequently passed the Labor Management Reporting and Disclosure Act of 1959, commonly referred to as the Landrum-Griffin bill, Section 703 of which undertakes to outlaw "hot cargo" clauses. They contend that these developments render the issues moot.

With respect to the first contention, the Commission in its report of June 1, 1959, in the instant proceeding found

(79 M. C. C. 599, 613) that the labor difficulties in question "were continuing to be experienced up to and including the time of the hearing." Moreover, in other proceedings where the labor difficulties under consideration had actually ceased at the time of the hearing, the Commission held that the issues were not moot. *Planters Nut & Chocolate Co. v. American Transfer Co.* [3 Federal Carriers Cases ¶ 30,143], 31 M. C. C. 719; *Montgomery Ward & Co., Inc. v. Santa Fe Trail Transportation Co.* [3 Federal Carriers Cases ¶ 30,596], 42 M. C. C. 212; and *Galveston Truck Line Corporation v. Ada Motor Lines, Inc., et al.* [*supra*], 73 M. C. C. 617. The Commission's conclusions in this regard are supported by numerous court decisions.

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, in which it was contended that the issues involving an order of the Commission were moot, the Court said (pp. 515-516):

"* * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review; and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

"In *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 308, the object of the suit was to obtain the judgment of the court on the legality of an agreement between the railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: "* * * Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the com-

mencement of the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the Act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case'." * * *

Also see *Van de Vegt v. Board of Commissioners*, 55 P. 2d 703, 710; and *United States v. Aluminum Company of America*, 148 F. 2d 416, 448.

In *Walling, Admr. of Wage and Hour Division, U. S. Dept. of Labor v. Haile Gold Mines, Inc.*, 136 F. 2d 102, 105, the Court, in rejecting an argument of mootness, said:

"It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. This is particularly true where the challenged practices are capable of repetition. Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter * * *".

MOOTNESS.

In their second argument, the plaintiffs and intervening plaintiffs, in their respective briefs, contend that the passage of the Landrum-Griffin Labor Reform Act, which purports in Section 703 thereof to outlaw "hot cargo" clauses in labor contracts, rendered moot the questions presented by the instant application, and that therefore the Commission's order granting the application should be set aside.

So far as we are aware there has been no court deter-

mination, whether or not the Act just referred to effectively outlaws "hot cargo" clauses, and many months or years may pass before there is a judicial interpretation of this Act. Even if an affirmative determination had been made, we maintain that the enactment of that legislation constitutes no basis for the voidance of the Commission's order granting the motor carrier authority in question.

There is no assurance, therefore, that the public will be protected against future cessations of motor carrier service resulting from labor difficulties such as are present here.

But completely apart from the question as to whether or not the Labor Management Reporting and Disclosure Act of 1959 effectively prohibits the type of concerted union activity which resulted here in the public being deprived of adequate transportation service, the fact remains that the record in this case establishes that some of the plaintiff carriers have elected to ignore their obligations as common carriers and their duties under the Interstate Commerce Act until after the present application was filed. In view of this conduct on the part of these carriers, the Commission was surely justified in issuing an additional common carrier certificate so as to insure that the public will not in the future have to again suffer from inadequate transportation service in this area.

The Commission is not concerned with the contents of the contracts which the carriers have with the labor unions, but the Commission is concerned with the conduct of the carriers in serving the public, without regard to those contracts.

The intervening Union argues that granting a certificate of convenience to applicant on the basis of the non-union character of applicant and on the basis of secondary boycott activity by a union injects the Commission into the area of labor relations and collective bargaining. In answer to that the Commission says that under its jurisdic-

tion, it cannot consider whether the applicant is union or non-union; that it has no power to regulate employer or employee labor matters; that Congress has vested the power to act in such matters with the National Labor Relations Board; and that its power to act under the circumstances of this case comes from the Statute of its creation which imposes a duty to see that common carrier service is rendered to the public; and that whenever there is a failure to render the service for any reason, except an Act of God, or by the public enemy, that it can act to remedy the matter by granting authority such as granted in this case. In answering to the boycott theory, it is sufficient to say that the Courts have held that such provisions in a labor contract are illegal and that Congress has now so determined. The further answer to its theory is that this record, under the facts established, shows no labor dispute between applicant and its employees, or any labor dispute that has not been corrected between the stockholder carriers and their employees. It does show an unsuccessful attempt on the part of the Union to organize the employees of the stockholder-carriers and that by its failure to so do it has effectively destroyed any jurisdiction of the National Labor Relations Board under the Act of its creation.

CONCLUSION.

The facts as herein above set out, and the law as herein announced, are hereby adopted as the findings of fact and conclusions of law.

It is Therefore Ordered, Adjudged and Decreed that the Order of the Commission be, and the same is hereby affirmed, and it is further Ordered, Adjudged and Decreed that the Complaint of plaintiff, and the Complaints of Intervening Plaintiffs be, and the same are hereby dismissed for want of equity.

Judge Major, Circuit Judge, concurs in the foregoing opinion of District Judge Poos.

MERCER, DISTRICT JUDGE, DISSENTING:

I cannot agree with the decision of the majority of the court and I therefore dissent. I would hold that the order of the Commission granting the certificate of public convenience and necessity to Short Line¹ was entered in violation of the Interstate Commerce Act, 49 U. S. C. Sec. 1 et seq., and that the order is therefore null and void.

Contrary to the suggestion of the majority opinion, we are not concerned with the validity of the basic, or evidentiary, findings of fact of the Commission. Plaintiff does not challenge the evidentiary findings and the Commission and the United States are without standing to challenge the validity of their own findings. To some extent, Short Line, as an intervening defendant, has attempted to raise that issue. As a party intervener on the Commission's side of the case, Short Line is in the same boat with the Commission and must sink or swim upon the strength of the findings as they are found and incorporated in the Commission's report.

Two issues are decisive of the case at bar, namely, whether the evidentiary findings of fact of the Commission support its ultimate finding of public convenience and necessity which forms the predicative basis for the Commission order, and, whether the Commission, in entering the order in question, exceeded the power and jurisdiction conferred upon it by Section 207 of the Interstate Commerce Act, 49 U. S. C. 307. In my opinion, the order must fall on each basis.

1. Nebraska Short Line Carriers, Inc.

ULTIMATE FINDING NOT SUPPORTED
BY EVIDENTIARY FINDINGS.

Beyond cavil, the Commission was not bound by the findings of fact of the examiner, whether evidentiary or ultimate, but it did adopt the evidentiary findings of its hearing examiner in this case. Disagreement with its hearing examiner is limited solely to a determination that the ultimate finding and conclusion by the examiner that public convenience and necessity had not been proved was erroneous. Granted that on a mere question of naked power the Commission did have authority to adopt an ultimate finding directly opposed to that recommended by its hearing examiner, but that naked authority is tempered by the legal requirement that the ultimate findings adopted by the Commission be supported by its own evidentiary findings of fact. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474; *United States v. Pierce Auto Lines* [5 Federal Carriers Cases ¶ 80,281], 327 U. S. 515, 533; *I. C. C. v. Parker* [4 Federal Carriers Cases ¶ 80,221], 326 U. S. 60; *Southern Kansas Greyhound Lines v. United States* [11 Federal Carriers Cases ¶ 81,035], D. C. Mo., 134 F. Supp. 502 aff'd 351 U. S. 921; *Seaboard Air Line Railroad Co. v. United States* [10 Federal Carriers Cases ¶ 80,980], D. C. Va., 131 F. Supp. 129, aff'd 349 U. S. 902; *Schaffer v. United States* [11 Federal Carriers Cases ¶ 81,053], D. C. S. D., 139 F. Supp. 444, rev'd on other grounds, 344 U. S. 83.

This case arises out of a rather simple situation as the following summary of the findings of the Commission reveal. Its apparent complexity follows from the emotional overtones inherent in the persual of the seeming overbearing attitude of a labor union in its attempt to enforce its will upon the stockholders of Short Line.

Short Line is a corporation organized by a number of east-

ern Nebraska carriers who own all of its capital stock.² Those carriers are hereinafter sometimes referred to as the stockholder carriers and, individually, as Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Superior, Pawnee, Derickson, Steffy, Wilber and Tillman.

All of the stockholder carriers operate principally between points in the State of Nebraska. All are non-union. Each of them handles both local freight and interstate freight. Each maintains interchange points, principally within Nebraska, for the interchange of interstate freight with line-haul certified interstate motor carriers. Interstate freight interchange was, from time to time, made with plaintiff, Burlington, the intervening plaintiff-carriers³ and other line-haul carriers. Hereinafter, for convenience, Burlington and the intervening plaintiff-carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as plaintiffs, except as the context otherwise requires. Individually, the intervening plaintiff carriers are referred to as Santa Fe, Watson, Red

2. These stockholder carriers are John Romans, doing business as Romans Motor Freight, Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, doing business as McKay Freight Line, Waldo W. Winter and Hubert B. Winter, doing business as Winter Bros., Abler Transfer Inc., Herbert Peters, doing business as Freemont Express Co., Henry G. Frear, doing business as (1) Superior Transfer and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Lewis Steffensmeir and Edward Steffensmeir, doing business as Steffys Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, and Harvey Tillman, doing business as Tillman Transfer Co.

3. Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc.

Ball, I. M. F.; Independent, Illinois, I. M. L., Navajo and Ringsby, respectively, in the order in which they are listed in footnote 3.

All of the plaintiffs are union carriers, and each has a collective bargaining agreement with the Teamsters Union. At all times material to this case, each of the union contracts contained a so-called hot-cargo clause which provided that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle hot-cargo, i.e.; freight produced or tendered by any person who was engaged in any labor dispute with the Teamsters or other labor union.

Beginning in 1955, the intervening plaintiff, Local 554⁴ began a drive to organize common carrier employees in the eastern part of the State of Nebraska. The attempt was made to organize a part of the stockholder carriers from the top down, i.e., by persuading the carrier to enter into a union shop agreement with Local 554 under which its employees would be required to become union members. When the union drive failed, normal freight interchange with a part of the stockholder carriers was interrupted. The affected stockholder carriers experienced refusal by certain of the interstate motor carriers, who were a party to the hot-cargo agreements, to pick up freight shipped over the stockholders' lines from points in Nebraska and destined for interstate points outside that State. Some shipments into Nebraska which were routed by the consignee for terminal delivery by the stockholder carriers were diverted from that routing for terminal delivery by other motor carriers or by rail. In many instances delays were experienced by shippers in delivery of goods shipped interstate by them and routed by motor carrier, and in the

4. General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

receipt of merchandise ordered by them for interstate shipment and delivery by motor carrier. Thus, it appears, from the evidence, and the Commission found that Romans, Abler, McKay, Peters, Lyon and Clark experienced a breakdown of interchange of freight and accompanying difficulties to varying degrees. On the other hand, neither Wilber, Tillman, Derickson, Steffy, Winter, Superior nor Pawnee ever experienced any breakdown or interruption of freight interchange.

As a result of the activities of Local 554 and the ensuing interchange interruption experienced by a part of their number, the stockholder carriers incorporated Short Line as an interstate motor carrier. The application for a certificate of public convenience and necessity was then processed with the Commission, seeking authority for Short Line to operate as an interstate carrier of general commodities, with exceptions, over regular routes between Omaha and Lincoln, Nebraska, on the one hand, and major mid-west cities and Denver, Colorado, on the other.

The examiner found that the routes designated in the Short Line application were served by other certificated interstate carriers, including the plaintiffs. He also found that the equipment of plaintiffs and other carriers whose routes duplicated those requested by Short Line in its application, was not being operated to capacity and that such carriers could handle additional interstate traffic whenever the same was available. In addition to the large number of certificated motor carriers who serve the points along the routes designated in the Short Line application, the affected area is served by either the Chicago, Rock Island & Pacific Railroad, the Chicago & North Western Railway, the Chicago, Burlington & Quincy Railroad, the Missouri Pacific Railroad or the Union Pacific Railroad. Each of the named railroads appeared in opposition to the application, and each was, as the master found,

able and willing to handle less than car load shipments destined for a part of the Nebraska communities included within the area served by the stockholder carriers. In this connection, also, the examiner found that Burlington and Santa Fe were continuing to interchange freight normally with the stockholder carriers at Omaha and Lincoln on all interstate shipments originating at or destined for delivery to Nebraska points. Interchange was being effected by the affected stockholder carriers with National,⁵ Ringsby, Rock Island,⁶ Bos,⁷ D. M. T.,⁸ and Merchants.⁹

The examiner summarized his evidentiary findings on the latter phase of the case in the following language:

“As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with stockholders named therein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging shipments with a considerable number of line-haul motor carriers. In any event, most of Peters’ interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D. M. T. and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder had been able to find a motor carrier willing to accept interstate shipments.

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5. National Carloading Company.
 6. Rock Island Motor Transit Co.
 7. Bos Truck Lines.
 8. Des Moines Transportation Company, Inc.
 9. Merchants Motor Freight, Inc.

"Although the shipper evidence relating to interior Nebraska points indicates that there have been some delays in transit, principally because shipments had been diverted to carriers other than those designated by the consignees, the shipments had been moving through to destination."

Again the examiner found as follows:

"On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic over their respective portions of the routes involved and the shipments are moving through to destination."

The Commission adopted the findings of the examiner, including the findings that Burlington, Santa Fe and other motor carriers were continuing normal interchange with the stockholder carriers, that the line-haul motor carriers operated over the routes proposed by Short Line and that their equipment was not used to capacity, that the line-haul carriers were enjoying the freight proposed to be handled by Short Line and that freight shipments destined to and from eastern Nebraska points were moving through to their consignment destinations.

Rather than disturbing the findings of the examiner indicative that the equipment and facilities of the certificated line-haul carriers were adequate to serve the routes sought by the Short Line application, the Commission reasoned that public convenience and necessity required allowance of the application because the breakdown of normal interchange relations with a part of the stockholder carriers constituted an abrogation by a part of the line-haul carriers of their duty to the shipping public which their certificates required. Thus, the Commission recognized that the disruption of normal interchange of freight with some of the stockholder carriers resulted from a labor dis-

pute between such stockholder carriers and Local 554. Although the Commission did not purport to decide the merits of that labor dispute, it reasoned that the certificated union carriers could not bargain away their duty to serve the public by an agreement with a labor union and thus relieve themselves of their obligations to the public as common carriers. The Commission concluded that certain of the line-haul carriers had, in reliance upon the "hot-cargo" clause of their contracts with the Teamsters Union, violated their duty as common carriers to serve the public, and that that violation had created a deficiency in motor service available to Nebraska shippers. Because of that deficiency, the Commission found that the present and future public convenience and necessity required that the Short Line application be allowed. An order was entered accordingly.

I would hold that the order be set aside for the reason that the finding of public convenience and necessity is contrary to the evidentiary findings of the Commission upon which that ultimate finding is based. Upon every application for authority to operate as a common carrier by motor vehicle between interstate points, the Commission must determine the adequacy of the facilities of existing carriers as a preface to its decision. In *Filson v. I. C. C.* [14 Federal Carriers Cases ¶ 81,316], D. C. Colo., 182 F. Supp. 675, the court said that "an inadequacy of existing facilities is a basic ingredient" for the determination of the existence of public necessity on a carrier certificate application. In *Hudson Transit Lines v. United States* [6 Federal Carriers Cases ¶ 80,503], S. D. N. Y., 82 F. Supp. 153, aff'd. 338 U. S. 802, the court held that a finding of the inadequacy of existing facilities is essential to support a finding of the Commission of public convenience and necessity for the grant of a competing carrier application. To the same effect are *Schaffer v. United States* [*supra*], D. C. N. D., 139 F. Supp. 444, rev'd on other

grounds, 355 U. S. 83; *Associated Transports, Inc. v. United States*, [13 Federal Carriers Cases ¶ 81,238], D. C. Mo., 169 F. Supp. 769; *Inland Motor Freight v. United States* [5 Federal Carriers Cases ¶ 80,244], D. C. Wash., 60 F. Supp. 520; *McLean Trucking Co. v. United States* [5 Federal Carrier Cases ¶ 80,291], D. C. N. C., 63 F. Supp. 829. In reversing the *Schaffer* case, the Supreme Court said that the relative adequacy of existing service is a significant consideration when interests of competition between carriers are being reconciled with the policy of maintaining overall sound system of transportation.

In *United States v. Detroit Navigation Co.* [5 Federal Carriers Cases ¶ 80,256], 326 U. S. 236, the court stressed the Commission's findings of inadequacy of existing facilities, in reversing a decision setting aside a Commission order granting new operating rights. The application for proposed carriage by water of automobiles from Detroit, Michigan, to other Great Lakes ports was opposed by the Navigation Company which had been previously certified to serve the same ports. The Commission had found that the service by the Navigation Company had been inadequate in peak season because of a shortage of available ships, that most of the Navigation Company's ships were, at the time of the application, in the service of the United States as a result of World War II and that post-war production of cars would far exceed the pre-war volume which the Navigation Company had carried, which would, in turn, require added facilities. Those findings were stressed by the Court as support for the Commission's order certifying additional service in competition with the protestant.

In *Norfolk Southern Bus Corp. v. United States* [7 Federal Carriers Cases ¶ 80,597], D. C. Va., 96 F. Supp. 756, aff'd. 340 U. S. 802, the court did say that it was not necessary for the Commission to specifically find that existing service was inadequate before granting a certificate for

additional bus service, but that statement must be viewed against the background of the evidence in that case indicating that the service and facilities of existing carriers were inadequate.

We are not here confronted with a mere failure to find, expressly that the existing carrier facilities and service capabilities are inadequate. What we are confronted with are findings of fact adopted by the Commission which lead to only one conclusion, namely, that existing carrier facilities and service capabilities are adequate. In my opinion, the ultimate finding of public convenience and necessity for granting the Short Line operating rights is diametrically opposed to those basic findings of fact.

It is no answer to say that existing carriers do not have an absolute monopoly with respect to the routes defined in their respective certificates. Neither, in my opinion, is the fatal defect in the predicative basis of the Commission's order overcome by anything expressed in the National Transportation Policy. The Transportation Policy merely expresses congressional intent that the Commission shall have authority to maintain an integrated system of interstate transportation by balancing the competitive rights of rail, water and motor carrier facilities to fulfill the transportation needs of the public. Both the Policy and Interstate Commerce Act contemplate the granting of limited monopolies. While a carrier may not cite its certificate as a monopoly grant foreclosing the grant of competing rights, it may cite its certificate, in conjunction with evidence of its ability to render adequate service to the shipping public, as persuasive evidence against an application for competing carrier service.

Monopoly grants are tolerated to avoid ruinous competition and unnecessary duplication of service. I would hold that the monopoly rights previously granted to plaintiffs and other interstate carriers are vested rights to the extent

that those rights ought not to be ousted or diluted, except upon a finding of inadequacy of existing facilities and of a demonstrated need for competing service as an integral part of a national system of transportation.

I would declare the order under review null and void for the reason that the finding of public convenience and necessity is not supported by the Commission's basic findings of fact.

LACK OF ICC JURISDICTION TO ENTER ORDER UPON REVIEW.

The more serious aspect of this case, and an issue equally fatal, in my opinion, to the Commission's order, is the question of the jurisdiction of the Commission to enter the order under review. Upon review of the whole case I am convinced that the Commission employed the certification procedures of Section 207 of the Act, for a purpose and in a manner for which the statute was never intended. The hard core of this whole case is one fact, namely, the existence of a labor dispute between Local 554 and certain of the stockholder carriers. Any doubt as to the large effect of that fact is dispelled by reading the Commission's report. Most significant, I think, is the fact that the Commission found it necessary to devote paragraph after paragraph and several pages of its report to a discussion of the labor aspects of the case and to an explanation that it was not deciding that labor issue. In like manner, in approaching the conclusion that the order of the Commission is valid, the majority of the court devotes some 15 typewritten pages of opinion to the labor aspects of the case, to the duty of a common carrier to the public despite labor involvement and to a discussion of the lack of any decision on a labor dispute in the Commission's disposition of this case.

Moving out from the hard core of the existence of a labor dispute, the Commission concluded that plaintiff

carriers, notwithstanding their union contract and possible labor involvement, owe a duty to the public which they should not shirk. Upon that conclusion is then erected a finding that some, but not all, of the certificated interstate motor carriers breached that duty which they owed to the public by creating a disruption of normal interchange of freight and, thereby, a deficiency in motor freight service to shippers in a part of Nebraska. Upon the verdict of the guilt of a part of the interstate motor carriers hangs the finding and conclusion that public convenience and necessity requires the certification of Short Line as an additional interstate carrier to compete with plaintiffs, both the guilty and the innocent, and to compete with the rail facilities which already exist and serve the interstate needs of Nebraska shippers.

I find the suggestion that Burlington, Santa Fe, and the other interstate carriers who continued normal interchange with the stockholder carriers are not affected or injured by the order to be a completely unrealistic concept. As I have previously pointed out the Commission found that these carriers were operating at less than maximum capacity for their equipment and facilities, and that they, along with the other interstate motor carriers had been enjoying the traffic which Short Line sought by its application. The order deprives the guilty and the innocent alike of traffic which they otherwise would enjoy.

I think the evil of the order lies in a simple but very significant fact which both the Commission and the majority of this court overlook, namely, that the basic findings of the Commission's report and the evidence adduced before the hearing examiner are geared to the complaint procedures established by Section 212 of the Act, 49 U. S. C. 312, not to the procedure contemplated by the express provisions of Section 207.

The evidence adduced before the examiner tended to

prove that some, but not all, of the plaintiffs and other interstate carriers had refused to conduct normal interchange of freight destined to and from destinations within the eastern part of Nebraska. Upon that evidence the Commission rendered its verdict of guilt, making no distinction between the guilty, the semi-guilty, and the innocent. The evidence as to the effect of the disruption of normal interchange by some of the line-haul carriers tended to prove that some, but not all, of the stockholder carriers had lost business and revenue because of the decrease of interstate freight. The shipper evidence supports the finding that some shippers in the area served by the stockholder carriers had incurred increased freight charges and less efficient motor freight service as a result of disruption of normal interchange. Again, the Commission's report makes no distinction between the injured and the uninjured.

The effect of the Commission's order is a *carpe blanche* decision that all interstate motor carriers operating through the interchange points used for eastern Nebraska freight are guilty, either actually or vicariously, of a breach of duty owed to the public under their operating certificates for which they would be punished by granting the Short Line application. The benefits of the granting of that application accrue not only to the stockholder carriers who were found to have been injured by the disruption of normal interchange, but, also, to the stockholder carriers who had not been injured and who, under the expressed finding of the Commission, had no complaint against the interstate carriers.

No case is cited by the Commission or by the majority of this court, and no case has been found, in which the certification procedure of Section 207 has been employed in this fashion. Cases upon which the Commission relies and which are cited by the majority of this court involved either a complaint proceeding or a civil action for injunctive

relief or for damages resulting from the failure of a carrier to render service commensurate with the obligations imposed by its status as a common carrier. *E. g.*, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, D. C. Minn., 105 F. Supp. 794, aff'd as modified, 8 Cir., 215 F. 2d 126; *Montgomery Ward & Co. v. Northern Pacific Terminal Co.* [10 Federal Carriers Cases ¶ 80,879], DC-Ore., 128 F. Supp. 475.

The Commission does have the authority under Section 212 of the Act, upon any complaint, after notice and a hearing, to compel a carrier to comply with the Act and with the duties and obligations imposed by its certificate of public convenience and necessity. *E. g.*, *Montgomery Ward & Company v. Santa Fe Trail Transportation Co.* [3 Federal Carriers Cases ¶ 30,596], 42 M. C. C. 212; *Planters Nut & Chocolate Co. v. American Transfer Company* [3 Federal Carriers Cases ¶ 30,143], 31 M. C. C. 719. Section 212 vests the Commission with a wide discretion to penalize violations of the Act and breaches of duty to the shipping public, which includes the suspension or revocation of a certificate previously granted.

The shipper or carrier injured by a violation of the Act by any carrier, or by a breach of the duties and obligations owed by a common carrier to the shipping public may prosecute an action for damages, *e. g.*, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, *supra*, *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, *supra*, or a suit to enjoin continuing unlawful conduct. *E. g.*, *Quaker City Motor Parts Co. v. Interstate Motor Freight System*, DC-Pa., 148 F. Supp. 226.

Either a complaint proceeding or a civil action for damages or injunction apparently would be appropriate in this case. As the examiner pointed out in his report, the evidence adduced in this case is geared to the com-

plaint situation, not to the customary certification proceeding under Section 207.

The distinction between a Section 212 proceeding and a civil action for relief, on the one hand, and Section 207 proceeding on the other, is too significant to lightly permit the latter to be used by a disgruntled carrier in discriminately as an equivalent substitute for the former. The Section 207 proceeding is an *ex parte*, although opponents of an application may appear and resist it. On the other hand, a Section 212 proceeding is an adversary action commenced by a complaint which must specify charges of some illegal action or breach of duty by a named carrier or carriers. As in litigation before the courts, the issues are squarely drawn. Due notice of the complaint and a full opportunity to appear and defend are the minimum requisites for a valid decision of the issues by the Commission. The initial burden of proof is on the complainant.

By contrast, the proceedings before the Commission in this case evince a serious, and I think unwarranted and unlawful, extension of the certification authority granted by Section 207. Here, an *ex parte* application was filed. Upon the hearing upon that application, by evidence adduced, both those stockholder carriers who claimed injury and those who, presumably, felt they might be injured in the future, converted the application into a broad charge of misconduct on the part of the line-haul carriers. I find that approach frightening enough when the question of adequacy of notice, alone, is considered. It becomes even more frightening when the evidence of misconduct of some of the line-haul carriers is made to attach vicariously and detrimentally to those carriers who conducted normal interchange.

While it cannot be doubted that the Commission does possess a large discretion to frame its decisions in a man-

ner calculated by it to implement the provisions of the Act, that discretion does not extend to the creation of a new penalty which is not expressly provided by the Act and which the framers of the Act never contemplated. In my opinion, that is what the Commission has done in this case, and its order should not be permitted to stand and become a very dangerous precedent.

Here, the Commission conceded that it was without authority to decide the merits of the dispute between Local 554 and a part of the stockholder carriers and to determine the validity of the "hot-cargo" clause. Yet it took the position that it could, nevertheless, find that a breach of duty had been perpetrated as a result of those labor questions by a part of the line-haul carriers serving eastern Nebraska, and, upon that finding, penalize all carriers in that classification by the grant of competing operating rights to Short Line. That is, I think, the crux of the true impact of the labor aspects on this case—they furnished an opportunity for the Commission to assert an authority beyond that granted by the Act.

The old axiom that "the hit dog howls" should be made to apply to this case. If Clark and others have a complaint against some or all of the line-haul carriers, they alone should do the howling. Section 212 of the Act provides them the opportunity to assert that complaint before the Commission and invoke a jurisdiction under which the issues could be decided in an appropriate proceeding. At least, until the complaint procedure has been tested, we should not permit the whole pack to come in asserting that some have been hit and claiming a right, on behalf of the pack, to a remedy which the Act was never intended to provide.

I would declare the Commission's order null and void.

APPENDIX B.

INTERSTATE COMMERCE COMMISSION.

No. MC-116067¹.

Nebraska Short Line Carriers, Inc.,

Common Carrier Application.

Decided June 1, 1959.

79 M. C. C. 599.

REPORT OF THE COMMISSION ON ORAL ARGUMENT.

BY THE COMMISSION.

These proceedings involve related issues and will be disposed of in a single report. They were heard on separate records and each was the subject of a separate recommended order of the examiner to which it was referred. Exceptions were filed by applicant to the recommended order of the examiner in the title proceeding, and a number of rail and motor carriers operating in the affected territory replied. No exceptions were filed to the recommended order of the examiner in No. MC-116067 (Sub-No. 2) proceeding, but it was stayed by us and applicant was thereafter permitted to file a brief, to which a number of rail and motor carriers replied. Oral argument has been held. Our conclusions differ from those recommended in the title proceeding.

By application filed June 22, 1956, as amended, in the title proceeding, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign

1. This report also embraces No. MC-116067 (Sub-No. 2), Nebraska Short Line Carriers, Inc., Extension—32 States (formerly entitled Nebraska Short Line Carriers, Inc., Common Carrier Application). The title has been changed to avoid confusion.

commerce, as a common carrier by motor vehicle of general commodities, with exceptions, between the points, over the regular routes, and in the manner described in appendix A hereto.

By application filed January 10, 1957, as amended, in No. MC-116067 (Sub-No. 2), hereinafter called the Sub-2 application or proceeding, the same applicant seeks authority to transport the same commodities as in the title proceeding, over irregular routes, between Omaha, Nebr., on the one hand, and, on the other, points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Both applications are opposed by a large number of rail and motor carriers as hereinafter described.

Applicant is a Nebraska corporation, initially organized June 14, 1956. It has an authorized capitalization of \$600,000, comprised of \$500,000 in preferred stock and \$100,000 in common stock. At the time of the hearings herein, 1 share of preferred stock had been issued, and there had been issued and paid for in cash \$37,500 in common stock. All but one-half share of the outstanding common stock is held, in varying amounts, by the following named motor carriers. The remaining one-half share is owned by one Harvey Tillman, who manages Tillman Transfer Company, which is owned by his wife, Helen L. Tillman. The stockholder-carriers are John Jack Romans, doing business as Romans Motor Freight; Fred L. Clark and Walter F. Clark, doing business as Clark Bros. Transfer; Royal F. Lyon, doing business as Lyon Transfer; C. C. McKay and Earl R. McKay, doing business as McKay Freight Line; Waldo W. Winter and Hubert B. Winter,

doing business as Winter ; Abler Transfer, Inc.; Herbert Peters, doing business as Fremont Express Co.; Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer; John Derickson, doing business as Derickson Transfer; Louis Steffensmeir and Edward Steffensmeir, doing business as Steffy's Transfer; and Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, all of which will hereinafter be referred to collectively as the stockholders-carriers, or individually by the names under which they are doing business. As of April 4, 1957, John Jack Ronians was President of the corporation, C. C. McKay was Vice President, Walter F. Clark was Secretary, and Royal F. Lyon was Treasurer, and such persons, together with Leonard Abler, of Abler Transfer Inc., were the directors of the corporation. Certain of these stockholder-carriers have heretofore conducted operations in interstate commerce, to the same extent as authorized in their Nebraska intrastate certificates, under the second proviso of section 206(a) of the Interstate Commerce Act, but they have since been granted certificates by this Commission. All are carriers of general freight operating over regular routes in eastern and central Nebraska converging upon Omaha, Lincoln, and Grand Island, Nebr., at which points they interchange traffic with other motor carriers for movement to and from points beyond Nebraska.

Applicant corporation owns no motor vehicles. It is contemplated that all vehicles initially required for the proposed operations will be leased from the stockholder-carriers or other carriers. As of January 26, 1957, applicant has assets totalling \$32,785, liabilities of \$467 and a net worth of \$32,318. As of March 31, 1957, the net worth of the corporation had decreased to \$25,825. It was granted temporary authority on December 4, 1956, for transportation as a motor common carrier of general commodities,

with exceptions, between Omaha and Chicago, serving no intermediate points, and between Omaha and St. Louis, serving the intermediate point of Kansas City except on shipments moving to or from St. Louis. As of the date of the hearing in the Sub-2 proceeding, it was operating one round trip schedule daily between Omaha and Chicago and between Omaha and Kansas City, with additional trips as needed. Operations to and from St. Louis were on a call-and-demand basis and were confined to truckload shipments pending completion of arrangements for facilities at St. Louis to handle less-than-truckload traffic. Terminal facilities were being leased at Omaha, Chicago, and Kansas City. All equipment operated was leased.

Applicant corporation was conceived and organized by the stockholder-carriers as a means of combatting a labor situation arising in the Spring of 1956, which threatened to deprive them of much of the interstate traffic which they had theretofore been handling, and, in fact, to drive them out of business entirely. For several years, the stockholder-carriers have resisted all attempts on the part of the Teamsters' Union² to organize their employees. Notwithstanding the almost complete lack of any inclination on the part of the employees for membership in the Union, the latter determined that such employees should be organized, and that they should be organized "from the top", that is, that organizational efforts should be concentrated upon the management of the carriers with a view toward the employees being blanketed into the Union by signing the carriers to a closed-shop agreement. Having been unsuccessful in the attempt to obtain contracts from the carriers, the Union decided to bring economic pressure to enforce their demands. This was accomplished by declaring certain of the stockholder-carriers "unfair" and the institution of a secondary

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

boycott against their traffic on the part of the larger unionized carriers with which the stockholder-carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to certain so-called "protection of rights" or "hot cargo" clauses contained in the labor contracts between the larger unionized carriers and affiliates of the Teamsters Union. Such clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a Union or refuses to handle "unfair" goods; and that the Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with a Union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to, establishments where picket lines, strikes, walkouts, or lockouts exists.

Commencing in the early part of May, 1956, certain of the stockholder-carriers began to experience difficulty in effecting normal interchange arrangements with the larger line-haul carriers with which they had theretofore done business. This difficulty was experienced primarily at Omaha, but also to some extent at Lincoln and Grand Island, and consisted of the refusal on the part of many of the larger carriers to accept outbound interline traffic tendered to them by the stockholder-carriers, and the refusal to turn over to the latter inbound traffic either routed over the latter's lines or which normally would have been turned over to them at Omaha and the other points named for ultimate delivery to interior Nebraska points served by them. None of the stockholder-carriers, except Clark Bros. Transfer, has ever had any dispute with its employees, and no picket lines had been established except around the Omaha terminal of Clark Bros. A picket line was established at the Clark Bros. Omaha terminal some time in Sep-

tember 1955, and all interline deliveries to the terminal ceased at that time. Four of Clark Bros.' seven employees at the Omaha terminal appear to have gone on strike initially. Clark filed charges with the National Labor Relations Board against the Union for unfair labor practices and the history of that matter is adequately described in the examiner's report.

In addition to the interline difficulties experienced by the stockholder-carriers described above, certain Omaha shippers have experienced labor difficulties resulting in the establishment of picket lines around their establishments, and the resultant refusal on the part of the organized carriers to provide pickup and delivery service thereat. If the instant applications are granted, applicant proposes to offer free and unrestricted interchange facilities at all points served and to provide pickup and delivery service at the establishments of all shippers desiring its services, regardless of picket lines.

At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previ-

ously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the other hand, the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all-motor traffic moving to and from Nebraska points through Omaha.

The Title Proceeding. As heretofore indicated, this application involves a proposed regular-route operation extending between Omaha, on the one hand, and, on the other, such points as Denver, Colo., Chicago, Minneapolis, Minn., and St. Louis, including service at intermediate points except in the case of a proposed alternate route between Omaha and Chicago.

The examiner found that applicant had failed to establish that the proposed operation is required by the present or future public convenience and necessity, and recommended that the application for additional operating authority such as that here considered was not the proper vehicle for remedying the situation, and that the aggrieved stockholder-carriers and shippers should have filed a complaint with this Commission, the National Labor Relations Board, or the Courts. Applicant takes vigorous exception to such suggestion, urging that the difficulties experienced by the shippers or consignees at Nebraska points served by the stockholder-carriers as a result of the breakdown of normal interchange relations with the unionized carriers and the difficulties experienced by certain Omaha firms occasioned by the refusal of the unionized carriers to make pickups and deliveries at their establishments through

peaceful union picket lines amount to service deficiencies, and that the only practicable way to correct such deficiencies and assure adequate service in the circumstances here present is by the certification of an additional carrier which is willing to conduct free and unrestrained interline operations with the stockholder-carriers. It argues that the record clearly establishes the inadequacy of existing motor service for the movement of traffic to and from the establishments of a substantial portion of the shipping public of Nebraska, and that such established inadequacy compels the granting of the authority sought.

In their replies to the exceptions, the opposing carriers and the Union³ argue generally that the conclusions of the examiner are in accordance with the law and the facts and should be sustained. They urge (1) that applicant's proposal here is based entirely upon a labor situation and that the proper remedy for any grievances sustained by the stockholder-carriers or the shipping public resulting therefrom is the filing of a complaint with this Commission, the National Labor Relations Board, or the Courts, (2) that the labor controversies here involved are matters within the exclusive jurisdiction of the National Labor Relations Board, and that this Commission is without authority either to determine the merits of the labor questions presented or to circumvent the questions by the granting of additional authority such as here sought by applicant, and (3) that even under the circumstances presented, applicant has failed to establish a need on the part of the public for the

3. Separate replies were filed by Local 554 of the Teamsters Union, Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, and opposing rail carriers; and joint replies were filed (1) by Watson Bros. Transportation Co., Inc., Union Freightways, Red Ball Transfer Company, Navajo Freight Lines, Inc., Independent Truckers, Inc., Prucka Transportation Inc., H. & W. Motor Express Co., and Denver-Chicago Trucking Company, Inc., and (2) by Illinois-California Express, Inc., Interstate Motor Lines, Inc., Ringsby Truck Lines, Inc., and Pacific Intermountain Express Co.

additional motor carrier service proposed and that it is fit and able properly to conduct an operation of the scope involved.

There is no serious dispute as to the facts.⁴ An examination of the record establishes that the pertinent facts are accurately and adequately stated in the report which accompanied the examiner's recommended order, and we shall adopt such statement as our own, confining our discussion herein to the issues presented by the exceptions and replies thereto.

In addition to the stockholder-carriers, the title application is supported by a large number of persons operating businesses in Nebraska who have occasion to ship or receive merchandise to or from points beyond the State and who, in many instances, are dependent upon the regularly scheduled service of the stockholder-carriers to meet their normal everyday transportation requirements. These persons represent business houses of various types at such points as Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. As a result of the breakdown of interchange arrangements at Omaha, shippers at interior Nebraska points have experienced delays in the movement of their outbound shipments to destination, and consignees at such points have experienced delays, inconveniences, and unforeseen expense in connection with their inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most logical manner, namely, over the lines of the stockholder-carriers providing daily scheduled service to their communities. When motor shipments are

4. Reference in the examiner's report to the fact that Clark Bros. Transfer had seven employees on September 14, 1955 is intended to refer to employees at the Omaha terminal only.

diverted to rail, the consignees suffer not only delays in delivery but also the additional expense of having to pay a combination of rail and motor local rates since there are no joint motor-rail rates published on such traffic through Omaha.

The difficulties of the Omaha shippers supporting the application are of a somewhat different nature. These firms, as a result of disputes with various labor organizations, have had picket lines established around their premises, and the refusal of the organized carriers to cross such picket lines has resulted in the almost complete withdrawal of motor service to their establishments. Of the three firms in this category, two have succeeded in resolving their labor disputes, at least to the extent of having the pickets withdrawn, and they were experiencing no difficulty at the time of the close of the hearings herein. The remaining firm, which operates a storage and distribution business in Omaha, with two warehouses at that point and one at Council Bluffs, Iowa, has had a Teamsters' picket line around the Omaha warehouses since May 24, 1956, and has been virtually without motor service because of the refusal of the unionized carriers to cross the picket lines. It has suffered a substantial loss of business as a result of its inability to obtain motor service for inbound deliveries and outbound distribution shipments. There is no evidence of violence or impending violence in connection with the picketing of any of these firms, and the refusal of the organized carriers to provide or attempt to provide pickup and delivery service appears to have resulted from their adherence to their "hot cargo" agreements, without regard to their obligations as common carriers.

The evidence concerning inadequate service, or lack of service, experienced by the supporting shippers is confined to shipments moving to or from points in eastern Nebraska, and there is no indication whatever of a need or professed

need for additional facilities for the movement of traffic between many of the points embraced in the application. Similarly, the service failures attributable to the breakdown of interchange arrangements appears to have occurred primarily and preponderantly as a result of the breakdown of interchange arrangements at Omaha, which is the gateway through which most of the eastern Nebraska traffic flows. As to origins and destinations beyond Nebraska, the evidence is concerned primarily with traffic moving to and from Des Moines, Minneapolis, Chicago, St. Louis, and Kansas City. There is no evidence of any substantial need for service to and from Denver or St. Joseph, Mo., which points were mentioned by a few of the supporting shippers. The application contains no practicable routing for the movement of freight between Omaha and Des Moines, and there is no satisfactory explanation as to why traffic moving between eastern Nebraska points and Minneapolis could not be routed through the Sioux City, Iowa, gateway, and thus bypass the Omaha interchange. Considering all of the evidence presented, therefore, it would appear to establish a need for additional motor service within the scope of the instant application between Omaha, on the one hand, and, on the other, Chicago, St. Louis, and Kansas City, restricted to traffic originating at or destined to points in Nebraska.

Evidence in opposition to the application was submitted on behalf of Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Denver-Chicago Trucking Company, Inc., Union Freightways, Illinois-California Express, Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Red Ball Transfer Company, Ringsby Truck Lines, Inc., Watson Bros. Transportation Co., Inc., and a number of rail carriers. All of the named motor carriers, except Pacific Intermountain Express and Denver-Chicago,

serve Omaha. Of those serving Omaha, Burlington Truck, Union Freightways, Illinois-California, Independent Truckers, Interstate, Navajo, Red Ball, Ringsby, and Watson Bros. operate between Omaha and Chicago. Five of the above named carriers, Red Ball, Watson Bros., Union Freightways, Burlington Truck, and Santa Fe Trail, operate between Omaha and Kansas City; Watson Bros., Union Freightways, and Burlington Truck operate between Omaha and St. Louis; Watson Bros. and Union Freightways operate between Omaha and Minneapolis; and Watson operates between Omaha and Des Moines. All of the opposing railroads serve Omaha, and, either directly or through their connections, serve all principal points on the routes involved in the instant application.

The Sub-2 Application. By this application, applicant seeks authority to transport general freight between Omaha and all points in 32 States. As in the title proceeding, the application is based upon an alleged inadequacy of existing motor service by reason of the refusal of most of the organized carriers serving Omaha to interchange traffic with the stockholder-carriers and their refusal to provide pickup and delivery service at the establishments of certain Omaha firms at which union picket lines have been established.

The examiner found that applicant had failed to establish that public convenience and necessity require the operation for which authority is sought, and recommended that the application be denied. As heretofore indicated, no exceptions were filed to the recommended order, but applicant was permitted to file a brief after the service of the order and the opposing carriers replied thereto. In its brief, applicant argues that it has met its burden of proving a need on the part of the public for the service proposed; that the granting of the authority sought is necessary in order to insure adequate transportation fa-

cilities to a substantial portion of the shipping public of Nebraska; that it is fit, willing, and able properly to provide the service shown to be required; and that it is the primary duty of the Commission to develop a national transportation system adequate to meet the needs of the commerce of all parts of the country. In their replies, the opposing carriers urge that applicant has failed to establish a need for any substantial portion of the service proposed; that it has failed to provide any convincing evidence that it is able, financially and otherwise, to conduct an operation of the scope suggested; that existing rail and motor services have not been shown to be inadequate; that any inadequacies experienced by the supporting shippers are attributable to labor difficulties over which this Commission has no jurisdiction; that any grievances which the stockholder-carriers or the shipping public may have against existing carriers should be made the subject of a complaint proceeding rather than an application for additional operating rights such as here involved; and that the authority of the Commission to grant new operating authority should not be used to circumvent labor disputes or cure temporary service deficiencies resulting therefrom.


The pertinent facts of record are adequately stated in the report which accompanied the examiner's recommended order, and we adopt such statement, as hereinafter augmented or modified, as our own.

In spite of the broad territorial scope of the application, and the voluminous testimony adduced from the stockholder-carriers, concerning their inability to effect normal interchange arrangements with a number of the organized carriers serving Omaha, very little evidence was submitted in this proceeding on behalf of persons or firms having occasion to make shipments through the Omaha gateway. Representatives of only six shippers appeared in support of the application. Of these, the Omaha Parlor

Frame Company,⁵ which is engaged in the manufacture of wooden furniture at Omaha, was experiencing no transportation difficulties at the time of the hearing herein, and testimony submitted in its behalf as to a need for additional motor service need not further be considered. The Broyhill Company manufactures farm equipment at its plant at Dakota City, Nebr., which is about 6 miles south of Sioux City, Iowa. During 1956 and the first quarter of 1957, it made shipments of its products to scattered points in 30 of the States embraced in the instant application and received inbound shipments of raw materials from scattered points in 17 of the States involved. There is no indication as to the frequency of the shipments referred to, the volume moved to any particular point, whether the traffic moved by rail or motor vehicle, whether, if by truck, it moved in truckload or less-than-truckload quantities, or how much moved through the Omaha gateway. On or about March 15, 1957, a number of its employees went on strike and a picket line was established around its Dakota City plant. As a result, the carriers formerly serving its plant, except stockholder Abler Transfer, discontinued providing pickup and delivery service at the plant. It supports the instant application in order that it may route inbound and outbound shipments via Abler Transfer through Omaha, at which point the shipments would be interchanged with applicant.

Two firms at Ord, Nebr., support the application. One is a dealer in farm implements and has occasion to receive shipments of implements and parts from Hopkins, Minn., Chicago and Rock Island, Ill., and Kansas City. The other sells and constructs steel farm buildings and receives most of its materials from Detroit, Mich. Their inbound ship-

5. Omaha Parlor Frame Company and the Chardon Company are affiliated firms occupying the same premises at Omaha. No attempt was made to distinguish between the separate requirements of the affiliates and we shall consider them as a single firm.



ments move predominantly through Omaha and they specify Romans Motor Freight as the delivering carrier out of Omaha because Romans provides a daily service between Omaha and Ord. Their routing instructions are frequently ignored and they have experienced numerous delays in delivery as a result of the traffic having been turned over for ultimate delivery to rail carriers or motor carriers serving Ord only on an irregular nonscheduled basis. Shipments diverted to rail involve added expense to the consignees because they are required to pay the difference between the all-motor joint rates under which the shipments were dispatched and the combination local motor and rail rates through Omaha or other points. A majority of the consignments to these two firms are in less-than-truck-load quantities.

Wheeler Lumber, Bridge & Supply Company supplies bridge construction materials and pole line materials to contractors. It has a warehouse at Norfolk and has occasion to ship or receive supplies from or to that point. The majority of its supplies, consisting of lumber and poles, originate on the west coast and move into Norfolk by rail. It does, however, receive some materials from such points as Minneapolis and Duluth, Minn.; Chicago and Peoria, Ill., St. Louis, Kansas City, and Pittsburgh, Pa., and about 75 percent of such traffic moves by truck. It has received alternate service from Clark Bros., and Abler Transfer in respect of traffic moving through the Omaha gateway and regularly specifies delivery by such carriers from Omaha. Such routing instructions are not always followed, however, and it frequently has experienced unwarranted delays in the delivery of its materials at Norfolk. It admittedly has single-line service from Minneapolis to Norfolk through the Sioux City gateway, and no difficulty appears to have been encountered on traffic moving in that manner. The company also has occasion

to make outbound shipments from its Norfolk warehouse to points in Iowa, and to some extent to points in Kansas, Minnesota, South Dakota, and Wyoming. If the instant application is granted it might ship to points in such States through the Omaha gateway, although admittedly the routing through Omaha would be circuitous to points north and west of Norfolk. As to the inbound shipments, there is no indication as to the volume received from any particular point, the frequency of service which might be required, or the percentage of shipments which might move in truckload or less-than-truckload quantities. As to the outbound traffic, there is no indication as to the points at which it desires service, the volume of traffic which might be expected to move into such States, the frequency of service which might be required, the nature of the shipments as to whether truckload or less-than-truckload, or the routings heretofore utilized. Further, the shipper appears to have made little or no investigation as to the service available to it other than that in connection with Clark Bros., and Abler Transfer through the Omaha gateway.

The remaining shipper submitting evidence in support of the application is Ford Storage and Moving Company. This firm operates two general warehouses at Omaha, and one at Council Bluffs, and has occasion to receive shipments of merchandise from out-of-state points and to make distribution of merchandise to points in the surrounding States. A Teamsters' picket line was established at its Omaha warehouses on or about May 24, 1956, and was still in existence at the time of the hearing herein. As a result, practically all inbound motor deliveries were discontinued and all attempts to obtain outbound service from the warehouses by unionized motor carriers theretofore utilized have been unsuccessful. Suppliers have been requested to make all inbound shipments by rail and they appear to have been generally agreeable. The inability to

obtain outbound service from the unionized carriers is said to have resulted in the loss of certain substantial accounts, and it is feared that additional business losses will result from the company's inability to obtain motor service, both inbound and outbound, to the extent that such service was available prior to the time the picket lines were established.

The record is vague and confusing as to the exact nature and scope of the motor service which might be required. During 1956, prior to the establishment of the picket lines, the company received inbound motor shipments, in substantial quantity, from Chicago, St. Louis, Kansas City, Louisville, Ky., Durham and Winston-Salem, N. C., Cincinnati, Ohio, Beloit, Wis., and Sioux Falls, S. Dak., and in smaller quantity from Bloomington, Ill., Duluth and Minneapolis, Minn., Buffalo, N. Y., Toledo, Ohio, and Houston, Tex. All of this traffic, however, with the exception of that originating at the two Minnesota points, appears to have either originated or been interchanged at Chicago, St. Louis, or Kansas City. Only 23,000 pounds originated at Duluth, and only 4,000 pounds at Minneapolis, and there is no indication as to the routing. There is no information whatever concerning the nature and extent of the outbound motor shipments made during that period, or thereafter, except the mere statement that outbound traffic moves to points in Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado, and that some is transported by rail and some by motor vehicle.

Obviously, the evidence submitted on behalf of the supporting shippers falls far short of establishing any substantial need on the part of the shipping public for additional motor service to the extent proposed, or, in fact, to any extent exceeding that for which a need is shown in the title proceeding and duplicative thereof. We cannot con-

sistently grant authority for the institution of a new service without a clear indication that the service sought to be established is needed by the shipping public and will be utilized in the event the authority sought is granted. We cannot make the necessary findings concerning a need for additional service unless we are furnished precise information in connection therewith. The fact that the stockholder-carriers have experienced difficulty in effecting interchange arrangements at Omaha and the fact that a few Omaha shippers have experienced difficulty in obtaining pickup and delivery service at their places of business does not establish a need for additional single-line service between Omaha and all points in 32 States.

In addition to the paucity of evidence concerning the existence of any substantial need on the part of the public for the service proposed, there is no convincing evidence that applicant has the resources or the experience to conduct such an extensive operation. No plan is advanced and none is apparent for handling less-than-truckload traffic over such a wide area and a considerable portion of the traffic here involved falls within that category. Even in connection with the movement of truckload traffic there is serious doubt as to whether applicant would be able to obtain return loads with sufficient frequency to effect a feasible and profitable overall operation.

We conclude that applicant has failed to establish a need on the part of the public for any part of the service proposed in the Sub-2 proceeding with the possible exception of that between Omaha and such points as Chicago, St. Louis, and Kansas City, which service would duplicate that for which authority is sought in the title proceeding, and that the Sub-2 application should be denied. In the circumstances, there is no need to discuss the voluminous evidence submitted on behalf of the opposing rail and motor carrier operating in the affected territory.

Further Discussion and Conclusions. We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board, and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act. The act imposes upon common carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding-out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs. This duty is almost an absolute one, and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. They cannot bargain away their duties and obligations to the public and thereby relieve themselves of such obligations.

The breakdown in interchange arrangements at Omaha between the unionized carriers and the stockholder-carriers and the refusal of the unionized carriers to provide pickup and delivery service at establishments where picket lines have been established has resulted in a substantial disruption in motor service to a large portion of the Nebraska shipping public, and the responsibility for the service deficiencies shown to exist must be laid at the doors of the unionized carriers which preempted their obligations to the Union to their obligations to the public. We do not hold

that all instances of refusal to provide service are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers. The apprehensions of certain of the organized carriers that any opposition to the demands of the Union would have resulted in reprisals against them appears greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc. changed its policy against interchange with "unfair" carriers before the close of the hearings herein without experiencing any difficulty. The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by the mere acquiescence in the boycott, the unionized carriers lose the protection which section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby. See *Carpenters' Union v. Labor Board*, 357 U. S. 93.

In a situation such as that here presented, there arises a

question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely the filing of the instant applications under the provisions of section 207 of the act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen.

One other matter requires consideration. As seen, the stockholders of the applicant corporation are carriers in their own right and jointly control applicant through stock ownership. Section 5 of the act provides that it shall be lawful with the approval and authorization of the Commission for any carrier, or two or more carriers jointly, to acquire control of another carrier through ownership of its stock. No application for such approval and authorization has been filed in connection with the acquisition by the stockholder-carriers of control of applicant, and any grant of authority found warranted herein will be conditioned upon the filing of such an application and the obtaining of our approval for the control now exercised.

At this point it may be well to note that the situation here presented differs from that considered in *Galveston*

Truck Line Corporation Extension—Oklahoma, M. C. C., decided concurrently herewith, in that the labor difficulties upon which the cited proceeding was based had, with one minor exception, ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term "present or future public convenience and necessity" in section 207 of the act, under which the applications were filed.

We find, in No. MC-116067, that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives, and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Omaha, Nebr., and Chicago, Ill., (a) from Omaha over Alternate U. S. Highway 30 to junction U. S. Highway 30 at or near Missouri Valley, Iowa, thence over U. S. Highway 30 to junction Illinois Highway 65 at or near Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, thence over U. S. Highway 34 to Chicago, and return over the same route, and (b) from Omaha over U. S. Highway 6 to junction U. S. Highway 66 near Joliet, Ill., thence over U. S. Highway 66 to Chicago, and return over the same route, and (2) between Omaha and St. Louis, Mo., from Omaha over U. S. Highway 275 to junction U. S. Highway 34 at or near Glenwood, Iowa, thence over U. S. Highway 34 to Kansas City, Mo., thence over U. S. Highway 40 to St. Louis, and return over the same route, serving no intermediate points on routes (1)(a) and (1)(b), and serving the intermediate point of Kansas City on route (2), restricted, in each instance, to traffic originating at or

destined to points in Nebraska; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, subject to the condition that the stockholder-carriers controlling applicant shall first obtain our approval of such control under the provisions of section 5 of the Interstate Commerce Act; and that in all other respects the application should be denied.

We further find, in No. MC-116067 (Sub-No. 2), that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, and upon obtaining our approval of the acquisition by its stockholders of control of the corporation, an appropriate certificate will be issued. An order will be entered denying No. MC-116067 except to the extent granted herein, and denying No. MC-116067 (Sub-No. 2) in its entirety.

COMMISSIONERS MURPHY, WALRATH, GOFF, and WEBB did not participate.

No. MC-116067

Appendix A (to Commission's Decision).

Nebraska Short Line Carriers, Inc.

DESCRIPTION OF AUTHORITY SOUGHT.

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30, to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph,

Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of June, A. D. 1959.

No. MC-116067.

Nebraska Short Line Carriers, Inc., Common Carrier
Application.

No. MC-116067 (Sub-No. 2).

Nebraska Short Line Carriers, Inc., Extension—32 States.

Investigation of the matters and things involved in these proceedings having been made, and said Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application in No. MC-116067, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That said application in No. MC-116067 (Sub-No. 2), be, and it is hereby denied.

By the Commission.

(Seal)

Harold D. McCoy,
Secretary.

APPENDIX C.

No. MC-116067.

Nebraska Short Line Carriers, Inc.

Common Carrier Application.

REPORT AND ORDER.

RECOMMENDED BY DONALD R. SUTHERLAND, EXAMINER.

By application filed June 22, 1956, as amended, Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from and to the points, over the routes and in the manner set forth in appendix A hereto. Certain carriers¹ and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, hereafter called Teamster, oppose the application.

1. Bruce Motor Freight, Inc., Brady Motorfrate, Inc., Burlington Truck Lines, Inc., Churchill Truck Lines, Inc., Denver-Chicago Trucking Company, Inc., H. & W. Motor Express Company, Illinois-California Express Inc., Independent Truckers, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Pacific Inter-mountain Express Co., Prucka Transportation, Inc., Red Ball Transfer Co., Ringsby Truck Lines, Inc., Rock Island Motor Transit Co., Santa Fe Trail Transportation Co., Union Transfer Company, doing business as Union Freightways, Watson Bros. Transportation Co., Inc., herein called Bruce, Brady, Burlington, Churchill, D. C. T., H. & W., I. C. X., Independent, Interstate Motor, Navajo, P. I. E., Prucka, Red Ball, Ringsby, Rock Island Motor, Santa Fe Trail, Freightways, and Watson, respectively. The application is opposed also by class 1 rail carriers in western trunkline territory.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on certain days in January and February, 1957, at Lincoln. Briefs have been filed.

Applicant, a corporation organized initially on June 14, 1956, is authorized to issue 1,000 shares of common and 5,000 shares of preferred stock at \$100 per share.² At the time of hearing \$37,550 of common stock had been issued. This was held in varying amounts by the following short-line nonunion motor carriers operating between certain points in Nebraska: John Jack Romans, doing business as Romans Motor Freight, Fred L. and Walter F. Clark, doing business as Clark Bros. Transfer, Royal F. Lyon, doing business as Lyon Transfer, C. C. McKay and Earl R. McKay, partners, doing business as McKay Freight Line, Waldo W. and Hubert B. Winter, doing business as Winter Bros., Abler Transfer, Inc., Herbert Peters, doing business as Fremont Express Co., Henry G. Frear, doing business as (1) Superior Transfer, and (2) Pawnee Transfer, John Derickson, doing business as Derickson Transfer, Louis Steffensmeir, and Edward Steffensmeir, doing business as Steffy's Transfer, Norman J. Rezny and Norman B. Slepica, doing business as Crete and Wilber Freight Lines, hereafter called, Romans, Clark, Lyon, McKay, Winter, Abler, Peters, Frear, Derickson, Steffy, and Wilber, respectively, and Harvey Tillman of Tillman Transfer Company. Romans is President, C. C. McKay is Vice President, Walter F. Clark, Secretary, and Lyon is Treasurer. These same persons, along with Leonard Abler, are the directors. Some of the stockholders hold certificate from this Com-

2. When the organization was initially incorporated the shares of common stock had a par value of \$50 each, and the preferred was \$100 per share. Subsequently, after the incorporation papers were amended, the common stock was reissued in the amount of \$100 per share to comply with Nebraska laws. Each \$50 payment which had been made on stock constitutes a half share.

mission, and others have authority from the Nebraska State Railway Commission which they have registered with the Interstate Commerce Commission under the second proviso of section 206(a) of the act. As here material, most of them are authorized to transport general commodities, with exceptions, between certain points in eastern and central Nebraska, including Omaha and Lincoln. One carrier, Derickson, operates between Grand Island and North Platte. Collectively, they operate numerous vehicles, some of which are suitable for transporting commodities requiring refrigeration.

Applicant's traffic manager has investigated the availability of terminal facilities at certain points and has been assured that necessary space is obtainable at Chicago, St. Louis, Kansas City, Minneapolis, and Denver. No investigation was made with respect to Des Moines. He has also found upon investigation that drivers and plenty of motor vehicles can be leased for the transportation of dry and refrigerated freight. Initially, applicant proposes to lease some equipment from its stockholders or other motor carriers. No definite schedules have been set up regarding the proposed operations, and the frequency of such schedules would depend to some extent on the availability of traffic. Although the traffic manager indicates that one driver would be used on each vehicle at the beginning of operations, relay points would be established if necessary. It is estimated that the running time from Omaha to Chicago would approximate 18 hours. If the authority sought is granted, applicant proposes to hold such service out to the public generally. Its general manager indicated that no discrimination would be shown in selecting carriers for interchanging traffic. As of January 26, 1957, applicant had total assets of \$32,785; liabilities of \$467, and net worth of \$32,318.

By order of December 4, 1956, in No. MC-116067 (Sub-

No. 1) TA, the issuance of temporary authority to applicant was approved for 180 days upon compliance with certain requirements, which were met January 3, 1957. Joint petitions for reconsideration filed by Watson, Freightways, Red Ball, and Prucka, to the temporary authority order were denied by the Commission on February 25, 1957. The temporary authority is set forth in appendix B hereto. Temporary authority is granted under section 210a of the act, and such a grant creates no presumption that corresponding permanent authority will be granted thereafter. In No. MC-116067 (Sub-No. 2) applicant has applied for certain permanent irregular-route authority for the transportation of general commodities, with exceptions, between Omaha, on the one hand, and, on the other points in certain States. A hearing has been held on that application and the matter is still pending.

In or about May, 1956, the stockholders began to experience difficulty at Omaha, Lincoln, and Grand Island, Nebraska in respect of interstate traffic normally interchanged at those points with certain connecting motor carriers. For example, Romans was informed in Omaha by an official of Independent that the latter carrier was risking labor difficulties with its employees, who are members of Teamsters, if normal interchange of shipments between these carriers was continued, and it did not desire to handle freight moving from or to Romans' line. Certain shipments tendered by Romans to Watson at Omaha on May 10, 1956 were not accepted by that carrier. These shipments, which were not tendered to any railroad, were accepted finally by Independent. Although Independent occasionally takes shipments from Romans, it does not do so in every instance. Furthermore, Romans is not given any traffic by Independent destined to the points he serves. Similar interchange difficulty has been experienced at Grant Island, particularly with Red Ball and Watson. Time is

consumed in finding motor carriers willing to accept traffic, and Romans' operations are otherwise disrupted by an abnormal number of requests from consignors to trace shipments.

Certain motor carriers, particularly Burlington and Santa Fe Trail, continue to interchange freight with Romans whenever shipments are tendered. Romans has through rates with Burlington to all points in the application and had this arrangement prior to May 7, 1956. Tenders of interstate shipments are made periodically to motor carriers other than Burlington and Santa Fe Trail to determine whether normal interchange has been resumed. Romans has requested some shippers to route their traffic via Burlington and his line. He has interchanged freight on certain occasions with Rock Island Motor, apparently without incident.

Romans' volume of interline interstate freight in 1956 decreased somewhat compared to the 1955 volume. His gross revenue in 1956 was \$159,280 and \$138,775 in 1955. Prior to May 1956, 30 percent of his traffic consisted of outbound shipments from the area he serves, and 70 percent was inbound. Presently, most of his traffic consists of shipments moving out of the territory he serves, and over half the outbound shipments are routed.

Prior to May 7, 1956, Romans interchanged freight in Omaha with Brady, Burlington, Freightways, Independent, Prucka, Red Ball, Ringsby, Santa Fe Trail, and Watson; also with Burlington-Chicago Cartage, Inc., Des Moines Transportation Company, Inc., Haeckl's Express, Inc., Ideal Truck line, Iowa-Nebraska Transportation Co., Inc., McMaken Transportation Company, Merchants Motor Freight, Inc., Revell Transit Lines, Roberts Transfer, Sturm Freightways, Trans-American Freight Lines, Inc., Wilson Freight Forwarding Company and Wright Motor Freight Lines, hereafter called B-C Cartage D. M. T.,

Haeckl, Ideal I. N. T., McMakin, Merchants, Revell, Roberts, Sturm, Trans-American, Wilson, and Wright, respectively. These were most of the major motor carriers with whom interchange was effected. After the approximate date of May 7, 1956, they would not tender or accept freight from Romans at certain times, and this has continued. However, as previously shown, Burlington, Santa Fe Trail, and Rock Island have continued interchange with Romans, and Ringsby also has accepted freight. Romans has not been requested by his employees to obtain a union contract. He does not think any of them are members of a union. There have been no strikes by his employees, and no pickets have been placed at his docks or terminals.

Abler's main office and terminal is located at Norfolk, and it serves Sioux City, Iowa, as well as Omaha. However, no terminal facilities have been operated by this carrier at Sioux City since about March 15, 1956, when certain unionized connecting motor lines serving that point discontinued normal interchange operations with Abler. Shortly thereafter, a similar discontinuance of normal interchange began at Omaha by most of the carriers with whom Abler interlined freight. Burlington and Santa Fe Trail continued to interchange traffic, and some shipments have been received from Ringsby. Occasional shipments were interlined with Freightways and Sturm. In June 1955, at both Sioux City and Omaha, Abler interchanged 400 shipments with Watson, and in June 1956, none were interchanged. In June 1955, at the same two points it received from 300 to 500 shipments from Freightways, and in June 1956, it interchanged about five shipments with that carrier. In the first nine months of 1956, Abler's gross revenue, including interstate and intrastate traffic was about \$70,000 less than that for the corresponding period of 1955. Abler was approached by union representatives, beginning in August 1955, relative to signing a contract.

He was advised by one union representative that a drive was on for memberships in Nebraska and the nonunion motor carriers were being contacted.

McKay operates terminals at Omaha, Fairbury and Beatrice, Nebr. It operates to and from about 45 points in Nebraska, some of which are not served by any other regular route motor carrier. Service is rendered daily out of Omaha and Lincoln. On or about April 17, 1956, a large number of motor carriers discontinued normal interchange with McKay at Omaha and Lincoln. At Omaha and Lincoln in 1955, McKay received 1,215 interstate shipments by interline from other motor carriers, and in 1956 it received only 210. Gross revenue in 1955 amounted to \$205,000, and \$156,000 in 1956. On some occasions McKay's driver was permitted to pick up the necessary freight bills and shipments at certain connecting carriers terminals. At other times he was not allowed to obtain the bills or the freight. Ringsby has accepted traffic from McKay since April 17, 1956, and Burlington and Santa Fe Trail have continued to interchange traffic at Omaha and Lincoln with McKay.

Wilber interchanges traffic at Omaha and Lincoln. Their annual gross revenue totals about \$60,000 and approximately 40 percent of this amount is derived from interstate traffic, including shipments transported between Council Bluffs, Iowa, and Crete, Nebr.

Tillman operates between Fremont and Lincoln. In 1956 this carrier grossed about \$47,000. About 10 percent of this was derived from transporting interstate traffic. At Fremont it interchanges traffic with Abler and Brandt Transfer, and at Lincoln with Burlington, Red Ball, and McKay.

Peters operates daily between Omaha and Fremont and transports some interstate traffic between these points.

At the time of hearing, Peters was still interchanging traffic with Prucka, Burlington, and I. N. T. He still interchanges freight now and then with certain other motor carriers, but not as frequently as formerly. Merchants, for example, before April 1956, gave Peters a substantial amount of traffic, but after that time very little. Also, certain traffic which Peters had received from Independent was given to Joe Roy Freight Line, hereafter called Roy. Most of Peters' present interchange traffic consists of shipments received in Omaha from National Carloading Company for delivery to Fremont. He grossed about \$20,800 in 1956 which compares favorably with other years, and about 85 percent of this revenue was derived from interstate business.

Derickson operates daily over U. S. Highway 30 between Grand Island and North Platte and interlines traffic at those points with various motor carriers without any apparent difficulties. Derickson serves numerous consignees who route their traffic for ultimate delivery over his line. Derickson has a number of competitors between Grand Island and North Platte, and considers the service he renders between these points as adequate.

Steffy operates over routes between Omaha and Creston, Nebr., and between Dodge, Nebr., and Sioux City. Some of Steffy's authorized points on and near Nebraska Highway 91, east of Creston, are not known to be served by any other motor carrier on a regular basis. It interchanges interstate traffic with various motor carriers at Omaha. Its profit in 1955 amounted to about \$6,000.

Lyon operates daily between Omaha and numerous points in northeastern Nebraska, including Norfolk, Albion, Newman Grove, Madison, Columbus, Elgin, Neligh, and Central City. He serves about 30 Nebraska points regularly, and interchanges interstate traffic at Lincoln and Omaha. Most of his traffic is transported between Omaha

and Columbus. Although Lyon operates over routes from Lincoln to Columbus, very little traffic is transported by him between those points. While he has been able to interchange with Burlington at Lincoln since September 1956, Red Ball has not interchanged shipments at that point. In February 1956, Lyon was approached by representatives of Teamsters (Local No. 554) to sign a contract. Lyon inquired whether the union represented his employees. When informed they did not, he refused to sign a contract. Subsequent efforts were made by the union to induce Lyon to sign a contract and when these attempts failed normal interchange ceased at Omaha on or about March 21, 1956. Previous to that time Lyon had been interchanging traffic with numerous line-haul motor carriers, but after that only certain operators continued to interline shipments with him on a regular basis, viz., Bos Truck Lines, Inc., hereafter called Bos, Burlington, Ringsby, D. M. T., and National Carloading. Also, at the time of hearing he was interchanging with Merchants on Minneapolis St. Paul traffic. D. M. T., and Prucka tendered some freight to Lyon during the last week of January, 1957. Certain of the carriers who no longer interchange with Lyon regularly, do accept occasional shipments; however, there have been instances when Lyon has not been given freight by these carriers which was routed over his line. The authority sought by applicant between Central City and Omaha duplicates Lyon's and Romans' operating rights between these points, and Lyon does not believe there is any need for additional service on that portion of the route between Omaha and Central City. There have been no strikes or labor disputes on Lyon's line, and no pickets at his places of business.

Winter operates between Omaha and Lincoln. The amount of interstate traffic transported by this carrier between these points is small. Winter's representative

believes more interstate traffic would be obtained if the application herein is granted.

Frear, under his Pawnee Transfer rights, can operate over regular routes between numerous points in southeastern Nebraska, including operations from Pawnee City to Lincoln; Lincoln to Beatrice; and Pawnee City to Omaha. Under his Superior Transfer rights he can operate over regular routes between various points in southeastern Nebraska, including operations between Superior and Hastings; Superior and Franklin, and Fairbury and Franklin. The Pawnee Transfer and Superior Transfer operations are not connected by any regular route. The operations, however, can be connected by the use of certain described irregular route authority.

Clark operates over regular routes between Omaha, Lincoln, and south Sioux City, on the one hand, and, on the other, numerous points in northeastern Nebraska; including Fremont, Norfolk, Neligh, Grand Island, Newman Grove, and Madison. It serves about 85 points, and 12 of these have no regular route motor carrier service other than Clark. It interchanges most of its interstate traffic at Omaha, and some at Lincoln. About 90 percent of its traffic is transported between Omaha at Norfolk. In 1955 Clark grossed \$286,346, 40 percent from interstate and 60 percent from intrastate traffic. In 1956 gross revenue was \$217,412, 4 percent from interstate and 96 from intrastate. Prior to September 1955, Clark conducted normal interchange with numerous motor carriers. Early in September, 1955 representatives of Teamsters (Local No. 554), who claimed to represent Clark's employees, visited Norfolk to negotiate an agreement. Clark declined to sign a contract because the union desired to include the carrier's employees at Norfolk as well as those at Omaha. On or about September 17, 1955 a picket line was placed at Clark's Omaha terminal. Thereafter, deliveries of interchange traffic to

Clark's terminal at Omaha ceased generally. Clark did, where possible, deliver outbound interchange shipments to connecting carriers. On or about October 1, 1955 Clark decided to file charges of unfair labor practices against Teamsters with the National Labor Relations Board, hereafter called NLRB. This action culminated in a signing of a settlement agreement on December 7, 1955 by representatives of Local No. 554, Fred L. Clark, and a representative of NLRB. The agreement was approved December 8, 1955 by the Regional Director of NLRB. Among other things, the agreement provided for the posting of a notice at the business office of Local No. 554 in Omaha. The notice in effect stated that the union would not induce or encourage employees of Santa Fe Trail, Red Ball, Merchants, Trans-American, D. M. T., Buckingham Transportation Company, Omaha Cold Storage Company, or Sinclair Refining Company, or any other employer to engage in a strike or concerted refusal in the course of their employment, to handle or work on goods, articles, materials, or commodities or to perform services for their respective employers where an object thereof was to force or require said employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the union as the collective bargaining representatives of its employees, unless and until the union had been certified as such bargaining representative in accordance with the provisions of section 9 of the NLRB Act. This notice was also posted at various docks and terminals in Omaha. Thereafter, normal interchange with most motor carriers was resumed for awhile until Clark's interline business dropped noticeably after January 10, 1956. However, from February through May, 1956, interchange was continued with Santa Fe Trail, Burlington, and Wilson. Pickets, however, remained at Clark's terminal and were still there in March 1956. One of Clark's former employees

(employed prior to September 14, 1955) is a picket. No pickets have been placed at the Norfolk Terminal. Four of Clark's employees went on strike initially. On September 14, 1955, he had seven employees.

Clark sought further relief and the NLRB obtained a temporary injunction on behalf of Clark against the union signed by the Chief Judge of the United States District Court for the District of Nebraska on July 30, 1956. The order of the Court, pending final adjudication by the NLRB of the matter involving Clark and the union³, was calculated to enjoin picketing at the premises of motor carriers⁴ and shippers who did business with Clark and to restrain the commission of acts or conduct inducing or encouraging the employees of said carriers or shippers to engage in a strike or a concerted refusal in the course of their employment to use, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where the object was to force or require said carriers or employers to cease doing business with Clark or to force or require Clark to recognize or bargain with the Teamsters (Local No. 554) or any other labor organization as the collective bargaining representative of any of Clark's employees unless and until the Teamsters or such other labor organization was certified as the representative of said employees in accordance with section 9 of the NLRB act. Thereafter, Clark tendered interstate shipments from time to time to certain motor carriers in Omaha. Specific instances are shown where D. M. T., Haeckl, Red Ball, Burlington, and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of inter-

3. Hearing on this matter was held before an NLRB examiner in May 1956.

4. Carters' premises specifically named in the order were those of Santa Fe Trail, D. M. T., I. N. T., Merchants, Bos. Independent, Wilson, Trans-American, and Red Ball.

state freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Santa Fe Trail, with one exception, has accepted freight from Clark. In nearly every instance Clark has been able to find a motor carrier willing to accept the interstate shipments. No instances are cited where rail carriers ever refused any shipments tendered by Clark. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments.

In regard to the NLRB proceeding involving Clark and the union, on December 26, 1956, an order was entered by NLRB requiring Teamsters (Local No. 554) to cease and desist from certain unfair labor practices in violation of section 8(b) (4)(A) and (B) of the National Labor Relations Act, and directing the union to take certain affirmative action, including the posting of a described notice. A copy of the NLRB order and a copy of the notice attached to that order are set forth in appendix C hereto. The NLRB order refers to certain employers at which premises notices should be posted by Teamsters Local 554. In addition to Clark, the employers identified in the NLRB record as affected by the Union's unfair labor practices are: C. A. Swanson & Sons; Omaha Cold Storage Company; Wilson Packing Co.; Swift & Co.; Santa Fe Trail; D. M. T.; Beacons Van & Storage Co.; Independent; I. N. T.; William A. Volker & Company; Bos; Sinclair Refining Company; Wilson Truck Lines; Red Ball; Haeckl; Merchants; and Darling Transfer Co.

Generally, the stockholders of applicant, with the exception of Clark, have had no dispute of strike with their employees. They are parties to certain tariffs published by certain rate bureaus and have executed concurrences for the interchange of freight on through routes and

through rates with various connecting motor carriers, including protesting motor carriers herein who also are parties to the tariffs published by the described rate bureaus. They hold themselves out to transport interstate freight on a through route-through rate basis. As to Clark, it has received only one cancellation notice on concurrences, from Riss and Company. If the authority sought herein is granted, the stockholders intend generally to enter into tariff concurrences with applicant and interline traffic thereunder.

SHIPPER EVIDENCE.

The shippers and consignees in support of the application are located at Arcadia, Burwell, Columbus, Fairbury, Lincoln, Loup City, Newman Grove, Neligh, Norfolk, Omaha, Ord, Pierce, Sargent, and Tilden, Nebr. Generally, with some exceptions, the traffic of these shippers and consignees involve less-than-truckload shipments.

Arcadia—The witness from this point operates the only drug store which serves an area of about 10 miles. No motor carrier serves Arcadia regularly other than Romans and that carrier is selected by the consignee to deliver his shipments which originate in or near St. Louis. Certain regular stock orders are received about twice a year, and additional shipments approximately every six weeks. Rail service is available to Arcadia, but freight trains do not arrive daily. Prior to the spring of 1956, motor carrier service was used more extensively than rail for the delivery of shipments and such service was satisfactory. After that time certain of consignees shipments which had been routed by motor carrier all the way from origin to Arcadia began to arrive by rail. In some instances Watson transported shipments to Grand Island and delivered them to the railroad for movement to Arcadia.

Some of the commodities involved were drugs which required expeditious delivery and the described combination motor-rail service was too slow. These shipments were routed by Watson and "Loup Valley", a carrier which had discontinued serving Arcadia. Since the shipments were routed by motor carrier the consignee expected that they would be delivered in this manner, and no authority was given to divert the shipments to rail. Some of the drugs require protection against freezing and because they are perishable motor carrier service is designated. Delivery of the described shipments by rail instead of motor vehicle resulted in drayage expenses and inconvenience to the consignee. Consignee has not given any consideration to using an originating carrier other than Watson from St. Louis, but has no objection to using Burlington to transport his shipments from that point. If the authority sought is granted, consignee would route shipments by applicant to Omaha or Grand Island and thence by Romans to Arcadia.

Burwell—Certain retail establishments at this point receive small shipments from Chicago, Des Moines, Kansas City, St. Louis, Minneapolis, and Denver, and pay the freight charges thereon. Prior to April, 1956, an automobile dealer received regular stock orders and rush shipments from Des Moines by motor carrier; also certain rush orders from Kansas City. On such traffic he specified Romans as the delivering carrier but did not designate the origin carriers. D. M. T. originated shipments in Des Moines, and the 2-day service rendered from that point was satisfactory. Red Ball originated the Kansas City shipments. After April 1, 1956, his shipments began arriving in Burwell by rail although he continued routing by Romans. In one instance the consignee was out of certain parts ordered from Kansas City. These were transported to Omaha by Red Ball and forwarded to

Burwell by rail. This type of service was too slow and inconvenient. In the three months prior to February 1957, however, the Kansas City shipments were again being delivered by Romans. D. M. T. also forwarded a Des Moines shipment from Omaha by rail to Burwell, which service was unsatisfactory and slower than the all-motor carrier service. In addition to the normal freight charges which consignee pays, certain other expenses were incurred on the combination motor-rail service. Consignee complained to its supplier in Des Moines and after July 9, 1956, some shipments were transported by D. M. T., and delivered by Romans. However, certain shipments routed by motor carrier from Des Moines were still delivered by rail. Since April, 1956, consignee has had difficulty in preparing its stock orders properly because of irregular delivery service. Sometimes when the placement of a current order is due, consignee has not yet received the previous order. In January, 1957, a shipment of parts from Des Moines was delivered by Romans. On Des Moines shipments, consignee has not requested its supplier to use a different origin carrier, although he has no objection to the use thereof.

A Burwell clothing merchant and a drug store owner have had experience similar to those of the automobile dealer. Shipments to them from Denver, St. Louis, and Kansas City routed by motor carrier have been diverted to rail. A shipment from Denver and two from St. Louis in the fall of 1956 destined to the clothing merchant were diverted by Watson to rail at Grand Island. In fact, from May through October, 1956, numerous shipments were received from St. Louis and Denver with some delivered by rail as described and some by Service Oil Company, hereafter called Service Oil, a competitor of Romans. Prior to the spring of 1956 this consignee had arranged to route most of his merchandise "by truck" and Romans,

who serves Burwell regularly, usually delivered the shipments. Consignee operates on a small inventory and prompt service is important. In or about October 1956, he requested suppliers to ship certain sized shipments by rail all the way because the combination rail motor service resulted in extra charges. Since then most of his shipments have been transported all rail and this is slower than the previous all-truck service. In January 1957, a shipment originating in St. Louis was delivered by Romans, and consignee desires the continuation of deliveries by that carrier. The drug store in Burwell, which pays the freight on some shipments, serves a substantial area, and it requires daily service by motor vehicle because its business is conducted on a low inventory. Rail service to Burwell is provided three days per week. Prior to the early summer of 1956, all its shipments from Chicago, St. Louis, Kansas City and Denver moved by truck and were delivered by Romans, which service was satisfactory. Thereafter, it began to receive shipments by rail. For example, a shipment in August was transported by Red Ball from Kansas City to Omaha and diverted to rail for delivery. This combined motor-rail service was slow and inconvenient. This consignee is willing to use a motor carrier for service from Denver to Grand Island for interchange with Romans at that point instead of Omaha.

A butter factory at Burwell ships truckloads of butter to Chicago. Each truckload, which moves about twice monthly, weighs 30,000 pounds, and is valued at \$18,000. Since the butter is perishable the shipper requires a dependable motor carrier service from origin to destination. Rail service is available from Burwell only on a tri-weekly basis, and shipper's factory is not located on a rail siding. The shipper does not route the traffic beyond Omaha, leaving it up to Romans to select a connecting carrier. Prior to March or April 1956, this arrangement was satisfactory

and the butter usually was delivered in Chicago on the second day. In some instances the trailers of Independent were loaded in Burwell by Romans and the shipment moved to Chicago without transfer of lading. Watson was also used as a connecting carrier. After April 1956, on two occasions, the consignee in Chicago phoned the shipper to inquire about shipments that had not yet been received. Because of this and the prevailing situation there is some anxiety on the shipper's part concerning the delivery of its shipments. However, all butter shipments tendered to Romans have moved to destination, and generally deliveries have been made on the second morning. The owners of the butter factory also operate an oil company in Burwell, retailing gasoline, oil, tires, auto accessories, and certain related commodities. The oil company had not received any inbound shipments from Chicago since the spring of 1956 and its representative was not certain whether any had originated at Minneapolis since that time. Some tanks had been received from St. Louis in May or June 1956, but it was not known definitely how this traffic was shipped.

Ord—Since July 1, 1956 a leather goods store had received about 57 shipments and approximately 37 originated at Chicago, Minneapolis, St. Louis, Kansas City, Denver, St. Joseph, and Des Moines. Its business is operated on a small inventory and prompt delivery is required on most shipments. Since about 1952 Romans has been designated by consignee to deliver most of the traffic although occasional shipments move by rail. Rail, however, is not satisfactory because daily service is not available at Ord. During the last six months of 1956 certain shipments from St. Joseph, Denver, Kansas City, Minneapolis, St. Louis, and Denver were delivered by motor carriers other than Romans. For example, a shipment from Minneapolis in November on which the consignee had requested shipper's

salesman to route by Romans for delivery was transported to Grand Island by Watson and transferred to Portis Transfer, hereafter called Portis. Service Oil has also delivered some shipments. Certain shipments from St. Joseph and Denver were routed rail from those points by the suppliers. The service of the other delivering motor carriers is not as satisfactory as that of Romans because the latter conducts a daily service at Ord. This store has no objection to using Burlington as an origin carrier from the points that carrier serves, and consignee recognizes that its suppliers might not have specified Romans as the delivering motor carrier in all instances.

A clothing store at Ord receives shipments from Chicago, St. Louis, Kansas City, St. Joseph, Denver, and Des Moines. It pays the freight charges, and motor carrier service is used more than rail for the necessary transportation. For a long time Romans has been designated as the delivering carrier on shipments from St. Joseph and Kansas City, and Romans has also delivered some Chicago shipments. Railway Express Agency, Inc., is used on shipments from Denver and St. Louis. Motor carrier shipments are received from Des Moines about twice a year. In or about June 1956, consignee began receiving deliveries by motor carriers other than Romans. Portis, in particular, has been delivering most of the shipments. Also, a shipment originating at Chicago in September 1956, was transported by combination motor rail. Prucka transported this shipment from Chicago to Omaha and transferred it to rail for delivery to Ord. This type of service was slow compared to the all-motor service rendered in connection with Romans. Also, the service by Portis is unsatisfactory because deliveries are usually made in the afternoon whereas Romans makes morning deliveries. Portis was requested to make morning deliveries but could not do so under its operating schedules. The availability

of daily delivery service by motor carrier is important in the proper functioning of consignees business.

A firm at Ord prints and publishes newspapers, magazines, catalogs, advertising material, and engages in certain other related activities. It ships a considerable amount of material to Chicago and some to Kansas City and Denver. It also buys certain supplies machinery, and repair parts in Chicago, and certain supplies and repair parts in Kansas City. Motor vehicle service is used for certain shipments to Chicago regularly and some traffic moves to Denver in this manner. Shipments to Kansas City, Minneapolis and St. Louis usually do not move by truck. Prior to the summer of 1956 this shipper used Romans in conjunction with Independent for service to Chicago and such service was satisfactory because customers could usually be assured of delivery within four days. Since that time certain of the Chicago customers have complained about delays in getting some shipments, and witness indicates some shipments take seven days for delivery. Some of the material shipped, such as monthly magazines, is dated and prompt delivery at destination is required. Also, catalogs for certain seasons of the year require expeditious and dependable handling. Presently, shipper can not assure its customers definitely of deliveries within a specified time and shipper's representative believes it has lost some business due to this situation. Shipper permits Romans to select the connecting carrier used beyond Omaha and witness could not name any carrier other than Independent which had been used beyond that point. This shipper also designated Romans to deliver inbound shipments from Chicago, and sometimes it specified the origin carrier. The inbound service prior to the summer of 1956 was satisfactory, but after that time the transportation on some shipments was slow. Burlington has not been specified to originate any Chicago shipments. Prior to the spring of 1956 some ship-

ments from Kansas City were transported by Burlington to Omaha for delivery by Romans and this service was satisfactory. After that time, however, one shipment was received by rail but witness did not know whether or not it had been routed in this manner all the way from Kansas City.

Newman Grove—A farm implement and machinery company receives shipments of repair parts from Kansas City, Kans. Regular stock orders are received about once a month and supplementary orders about once a week. Prior to the summer of 1956 these shipments were transported by Red Ball and Darling to Omaha and transferred to Lyon for delivery. Since that time carriers other than Lyon have been making deliveries. In some instances shipments were delivered by one of these other carriers to Neligh and the consignee had to pick them up at that point. Also, Roy has delivered some of the shipments to Newman Grove. Generally, the service of these carriers was not satisfactory because there had been some delays in receiving shipments and extra expense incurred by consignee. When Lyon delivered the shipments, service into Newman Grove was rendered four or five times a week. Roy does not render such frequent service. Frequent service, however, is required because some parts moving from Kansas City are needed by farmers to repair their harvesting machinery. Although rail service is available at Newman Grove, it is not rendered on a daily basis. Consignee has no objection to using Burlington or Santa Fe Trail as origin carriers if satisfactory service can be rendered.

A creamery in Newman Grove ships truckloads of butter regularly to Chicago. It selects Lyon to transport the shipments to Omaha, but does not designate the carrier beyond, although it has the privilege to do so. Usually, Lyon has interchanged the shipments at Omaha with I. N. T. Although on two occasions (in the summer) complaints

have been made on the condition of the butter when received at destination, most of shipments have been transported to Chicago satisfactorily. The creamery has not endeavored to obtain single-line motor carrier service from Newman Grove to Chicago or to route its shipments beyond Omaha over Burlington's line. Rail service is not used because it is not available daily at Newman Grove. In addition to outbound traffic, the creamery receives occasional shipments of supplies from Kansas City, Minneapolis and Chicago which are shipped by motor vehicle. The creamery does not designate the origin carrier on such shipments. It does, however, specify Lyon for delivery. In 1956 deliveries were made by other carriers. This was not satisfactory because of delays. In four months prior to February 14, 1957 most of the inbound shipments were delivered by Lyon. Abler and Clark delivered some shipments, and such service was satisfactory. The creamery is willing to use Burlington in connection with Abler and Clark if the traffic would move without delay. Rail is used for some inbound shipments but is not satisfactory for all, principally because such service at Newman Grove is provided less frequent than required.

Sargent—A department store at this point receives shipments from Kansas City, St. Louis, Minneapolis, Chicago, St. Joseph, and Des Moines. Prior to the summer of 1956, its traffic from these points was received by rail, motor carrier, and parcel post. Motor carrier shipments, with a few exceptions, were delivered by Romans, and such service was satisfactory. Consignee paid the freight charges on most shipments. Generally, consignee did not designate the origin carriers on the motor carrier shipments delivered by Romans. After the summer of 1956, motor carrier shipments began to arrive by rail and the receipt of merchandise was delayed; also, some extra expenses were incurred by the consignee. For example, a

shipment in August 1956 was transported by Prucka to Omaha and transferred to rail for delivery to Sargent. In early September, Merchants did the same thing on a shipment from St. Paul. Consignee then advised his suppliers to use all-rail service and since September 1956 deliveries of interstate shipments from the above-described origins have been made in this manner. Rail is a little slower than the all-motor service. Consignee is aware of no motor carrier other than Romans who serves Sargent regularly. One of Romans' drivers suggested that consignee route its traffic via Grand Island instead of Omaha but this advice was not followed.

A retail hardware store at Sargent receives shipments from Kansas City and St. Joseph. Prior to the summer of 1956, it used motor carrier service for transportation. Some of its customers, particularly contractors, desire expeditious deliveries of merchandise and motor carrier service is needed to satisfy their demands. Romans and another motor carrier (which sold its business) delivered most of the shipments and such service was satisfactory. Consignee began receiving its shipments by rail and in September 1956 it changed to that mode of transportation. Thereafter, it changed back to motor service. It designates Romans to suppliers' salesmen for deliveries but does not specify the origin carriers. In January 1957, consignee began receiving satisfactory service again with Romans as the delivering carrier.

A dealer in farm machinery, implements, and supplies, receives motor carrier shipments from a point near Minneapolis. The prior service with Romans as the delivering carrier was satisfactory, but in September 1956, consignee requested its supplier to use rail the entire distance. This resulted from the fact that D. M. T. had transported a shipment to Omaha and transferred it to rail for delivery to Sargent. Rail deliveries are not satisfactory because

daily service is not available at Sargent. Daily service by motor carrier is required for some shipments, particularly on parts which are needed by farmers for repair work. Consignee is not aware of any motor carrier other than Romans who serves Sargent regularly. When prior motor carrier service was used consignee attempted to designate the origin carrier in certain instances but the supplier did not follow such designations.

Pierce—A hardware merchant at this point receives merchandise from Minneapolis and most of the shipments are transported by truck. He operates on a low inventory and prompt deliveries by motor vehicle are required. Although he designates the delivering carrier, suppliers select the origin carrier. Prior to March 1956, Hess Motor Express, Inc., (now Murphy Motor Freight Lines), hereafter called Hess, transported the shipments from Minneapolis to Sioux City, and Abler delivered them to Pierce. This service was satisfactory. In March 1956, Hess refused to transfer certain Minneapolis shipments of consignee to Abler because the latter was a nonunion carrier. Consignee needed the merchandise involved, and traveled to Sioux City personally to pick up the shipments. After this experience he tried using rail service which was not satisfactory. He changed back to motor service and Middlewest Motor Freight (now Barber Transportation Company), hereafter called Middlewest, began delivering shipments. This service from Minneapolis is not as fast as that rendered when Abler made deliveries prior to March 1956. If applicant is granted authority from Minneapolis, consignee believes it can obtain satisfactory service by way of Omaha even though this is a more circuitous route than shipment via Sioux City.

Tilden—A retailer of petroleum products, tires, and accessories receives shipments from Des Moines and Kansas City by motor vehicle. He designates Clark to handle

deliveries and the suppliers select the origin carriers. Prior to the spring of 1956, the motor carrier service with Clark making deliveries was satisfactory. Since that time deliveries have been made by Middlewest, Abler, and Lyon. Shipments handled by Middlewest moved through Sioux City to Neligh, and are then delivered from that point to Tilden. Usually, about one week is required to deliver shipments from Kansas City and Des Moines. Consignee receives better service than this when the shipments are handled by Abler because Omaha is used as an interchange point instead of Sioux City.

Loup City—A dealer in farm equipment and small trucks receive shipments of truck parts from Kansas City. Prior to the summer of 1956, Romans and his predecessor, Loup Valley, delivered this traffic. Consignee paid the freight charges on some shipments and others were prepaid. Consignee had been routing this traffic via Darling from Kansas City to Omaha and thence by Romans to Loup City. In or about June 1956, deliveries were made by Arrow Freight Line, hereafter called Arrow. This was satisfactory, except Arrow delivered shipments in the afternoon whereas Romans made morning deliveries. Arrow, however, discontinued serving Loup City directly and transferred the shipments to Romans or Service Oil at Grand Island, which resulted in three-line service and consignee received its merchandise a day or two later.

Neligh—An automotive dealer at this point receives emergency shipments of parts from Des Moines. Normally, these shipments were transported by D. M. T. to Omaha and thence to Abler or Clark, which were designated by consignee, for delivery. Usually, three-day service was rendered by the described carriers and such service was satisfactory. In the spring of 1956, Middlewest and Lyon began to deliver shipments and delays in receiving parts occurred. Instead of three-day service from

Des Moines consignee in some instances received five-day service. Lyon's service usually has been quicker than that of Midwest. Although the supplier at Des Moines, on many shipments, attempts to honor consignees' designations of delivering carriers, it does not do so in all instances. On some occasions, at consignee's request, Burlington has been used from Des Moines. The supplier, however, usually selects the origin carrier, and D. M. T. is used more frequently than Burlington. In some instances, when Burlington originated shipments, the service has been satisfactory, and at other times it has not. It is indicated, however, that shipments moving via Burlington and Abler have been transported satisfactorily. Recently, when Burlington was used from Des Moines, Abler rendered the delivery service.

Norfolk—A tire dealer, who operates on a small inventory, receives shipments principally from Kansas City, Chicago and St. Louis. Clark and Abler, which were designated by consignee, delivered the shipments and this service was satisfactory. In the fall of 1955, consignee began receiving shipments by other carriers. For example, a shipment from Kansas City was transported by Red Ball to Omaha and transferred to Roy instead of Clark. Consignee refused delivery by Roy, and the shipment was returned to Omaha. The merchandise finally was reshipped from Omaha and delivered by Clark. A shipment from St. Louis routed over Watsons' line for transfer to Clark was delivered by Roy. The service rendered by Roy is comparable to that rendered by Clark and Abler from Omaha to Norfolk. Recently, Burlington has been used for some shipments from Chicago and Kansas City, and these were transferred to Clark as requested. Such service was satisfactory. On other shipments from those points consignee's routing instructions were not honored by the suppliers who used other origin

carriers. Freightways has transported some shipments from Chicago and transferred them to Middlewest. Since October 1956, consignee's shipments, with some exceptions, have been delivered by Clark and at the time of hearing service was reasonably satisfactory.

A seed dealer at Norfolk receives shipments principally from Kansas City, Des Moines, and Chicago, and occasional shipments from Minneapolis and St. Louis. It operates on a small scale and requires expeditious transportation in some instances to replenish its stocks. It does not use rail-service. It pays the freight on some shipments and the suppliers on others. In the summer of 1955 most of the shipments from Kansas City were transported by Watson, Prucka, Red Ball and Burlington, and transferred to Abler or Clark at Omaha for delivery. This service was satisfactory. In or about July 1956, consignee began receiving deliveries by other motor carriers, including Roy. In September 1956, it requested the Kansas City supplier to use Burlington and since then shipments from that point have been received satisfactorily. It has not designated specific origin carriers from Des Moines or Chicago. Usually, Watson originates the shipments from Chicago, Minneapolis, and St. Louis, and Burlington from Des Moines.

A dealer in outboard motors, boats, marine hardware and related articles receives shipments from Kansas City, and St. Joseph, on which he pays the freight. He does not maintain a larger stock of boats or motors, and frequently customers' purchases are ordered directly from the supplier. Therefore, expeditious transportation is required. Prior to April 1956, Darling transported the shipments from St. Joseph and Kansas City to Omaha and Abler delivered them. Consignee designated such service and it was particularly satisfactory because Abler notified the consignee prior to actual delivery of certain boats and

other bulky merchandise. This permitted consignee to arrange deliveries directly to his customers. In some instances Clark was used and provided a similar service. In or about April 1956, deliveries were made by other motor carriers, including Roy, even though Abler was still designated by consignee to handle the shipments. In January 1957, however, consignee routed a shipment from St. Joseph by Burlington and this was delivered by Abler. Apparently this service was satisfactory.

A retailer of plumbing fixtures, water softeners, and related supplies receives shipments from Chicago on which it designates the routing. Prior to September 1955, it used either Independent or Freightways from Chicago to Omaha and thence Abler or Clark to Norfolk. Since then the shipments have been delivered by other carriers, including Roy and Midwest. In or about December 1956, consignee began routing its shipments from Chicago via Burlington; when Abler was specified as the delivering carrier, the routing was followed, but when Clark was designated the shipments usually were delivered by Roy. Consignee has no objection to using Ringsby from Chicago to Omaha if its service is as good as that of Burlington.

A dealer in heating and air conditioning equipment receives most of its shipments from Marshalltown, Iowa, and occasional freight from Des Moines, Chicago, Kansas City, and St. Louis. It pays the freight on this traffic, and routes the shipments from Marshalltown. The suppliers at Chicago, Kansas City, and St. Louis select the carriers used from those points and the dealer designates the delivering carrier. The dealer installs equipment in buildings at Norfolk and points nearby. Frequently, shipments from the described origins are made direct to the job sites. Prior to the fall of 1955, Bos was used from Marshalltown to Omaha and Clark delivered the shipments. This service was satisfactory, particularly since Clark made deliveries

direct to job site and operations of the dealer and its installation crews could be conducted efficiently. Although in 1956 Clark was still designated by the dealer on routings, certain shipments were delivered by other motor carriers, including Roy. Since the dealer was not certain his shipments would be delivered by Clark, some equipment which normally would have been routed directly to nearby job sites was routed to Norfolk. Clark is located at Norfolk, and the dealer finds it convenient to obtain information from that carrier concerning its shipments. He tried rail service on a shipment from Marshalltown but this was too slow to meet his needs. The dealer has no objection to using Santa Fe trail for shipments from Kansas City. It has complained to Bos about disregarding routings, but still receives shipments by carriers other than Clark.

A processor of dairy products at Norfolk receives shipments principally from Chicago, and some traffic from Denver, Kansas City, St. Louis, Des Moines, and Minneapolis. It pays the freight charges on a large percentage of the shipments from Chicago. Although it designates Clark and Abler for delivery of shipments, the suppliers usually select the origin carriers. Watson and Burlington, among others, have been used from Chicago. When Abler and Clark were used for deliveries, the service was satisfactory. In the latter part of 1955 deliveries were made by motor carriers other than those designated, including Roy and Midwest. Delays occurred, and consignee complained to Watson. However, shipments from Chicago originated by Watson continued to be delivered by Roy.

The Young Men's Christian Association at Norfolk receives shipments of various supplies from Chicago, Kansas City, and St. Louis, and pays the freight charges thereon. Prior to September 1955, Clark was designated as the delivering carrier, and service by motor vehicle from the

above-named points was satisfactory. After that time consignee's designations of Clark were disregarded on numerous shipments and deliveries were made by other carriers, including Roy. Consignee has requested suppliers in Chicago to use Burlington, and those at Kansas City to ship by Santa Fe Trail. Shipments from those points are still delivered by Roy contrary to routings. In one instance, although Santa Fe Trail in conjunction with Roy rendered second day service on a shipment from Kansas City to Norfolk, consignee refused to accept it. It was ultimately delivered by Clark. The Norfolk Chamber of Commerce also supports the application.

Columbus—A company at this point is engaged in manufacturing farm and industrial equipment, including corn cribs, grain bins, crop-drying machines, and power steering devices. It receives various raw materials in considerable quantities from numerous points, including Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Ill., and Hammond, Ind. The majority of the inbound shipments are carloads transported by rail, and motor carrier service is used also. Outbound shipments are made to various points. During the last ten months of 1956 it made slightly over 1,200 shipments from Columbus, and 57 of these were destined to points on the routes involved herein. Prior to the summer of 1956 Lyon was used satisfactory as the originating carrier on some outbound shipments and delivered certain inbound traffic. Since then certain shipments routed from Columbus over Lyon's line have not been accepted by connecting carriers. In addition to Lyon a number of other motor carriers served Columbus directly, including Watson, Ringsby, Bos, Freightways. Also, this manufacturer operates some of its own motor vehicles. Generally these are used to points such as Chicago, where inbound shipments can be picked up for return to Columbus. Watson and Freightways have been

used for some shipments from Chicago to Columbus and such service was satisfactory.

Fairbury—A chain organization engaged in operating variety and department stores receives a wide range of commodities from Minneapolis, St. Paul, Chicago, Kansas City, and St. Louis. A considerable amount of the shipments from these points is transported by motor carriers. Consignee pays the freight charges on about 75 percent of these inbound shipments, and instructs its suppliers to use McKay as the delivering carrier. Various motor carriers have been used from the origins, including Burlington, Watson, and D. M. T. The motor carrier service prior to April 1956, was satisfactory. After that time consignee's designations of McKay were not honored, and it began to receive deliveries by Superior. That service, however, was not maintained with sufficient regularity to satisfy the consignee. Because its motor carrier routings were not honored completely, consignee began using rail service more extensively. Such service, however, is slower than the prior motor carrier service rendered in conjunction with McKay. Although Superior was still delivering some shipments in or about the latter part of 1956, McKay was not delivering any at that time to consignee.

A wholesale and retail store engaged in selling paint, wallpaper, floor coverings, and other merchandise receives shipments by motor carrier from St. Louis, Chicago, Lyons and Joliet, Ill., Kansas City, Minneapolis-St. Paul, and Des Moines. Prior to April 1956, most of the motor carrier shipments from the described origin points were transported by Watson to Lincoln and thence McKay to Fairbury. This service was satisfactory. Then other carriers, including Superior, began making deliveries contrary to designated routings. Consignee is not satisfied with Superior's service entirely because there have been some delays. Shipments from Chicago, in which consignee is

particularly interested, were not received as expeditiously as formerly. Consignee attempted to route Chicago shipments via Burlington but the supplier used other originating carriers, including Watson and Independent. In May 1956, consignee began using rail transportation more extensively from Chicago, which is slower than the service previously rendered by Watson and McKay.

A company at Fairbury manufactures pump jacks, cylinders, water supply equipment, and windmills. It is also a wholesaler of plumbing supplies. It receives shipments from Chicago, Kansas City, St. Louis, Des Moines, and Denver. Finished products are shipped from Fairbury to various points. The majority are routed by the consignees, and some by the manufacturer. It has used the joint service of McKay-Watson on shipments moving to certain undisclosed destinations in Iowa and Illinois. Prior to April 1956, a majority of the inbound shipments were delivered by McKay, whom the manufacturer designated on most orders. This service in conjunction with the origin carriers was satisfactory. In April 1956, Superior began delivering shipments, but such service was not entirely satisfactory because delays occurred in receiving merchandise. The manufacturer's purchasing agent was then instructed to use rail as much as possible for shipments from Chicago. However, this shipper still routes many shipments by McKay, who makes some deliveries; and such service has been satisfactory. The manufacturer is still not entirely satisfied with Superior's service. It has no objection to using Burlington or Ringsby as origin carriers from Chicago. On outbound shipments the manufacturer honors consignees' routings, and McKay is designated in some instances to originate shipments.

Lincoln—A wholesale drug company receives shipments from various points. Most of its traffic originates in Chicago, St. Louis, and Kansas City. Since its warehouse

space is limited, it buys in small quantities. Because of this method of operation expeditious deliveries by motor carrier are required. Various motor carriers are used to originate shipments from Chicago, including Independent, Red Ball, Haeckl, Freightways, Watson, and Prucka; Burlington. Watson, and Freightways are used extensively from St. Louis; and Red Ball, Watson, Prucka and Freightways from Kansas City. No complaint is made regarding the service from St. Louis and Kansas City, but dissatisfaction is expressed concerning the delay in receiving some shipments from Chicago, particularly in the winter in respect of commodities requiring protection from freezing. Consignee complained to Red Ball who is rendering single-line service to Lincoln, and discovered that carrier did not always have protective equipment available for daily service to Lincoln. Sometimes shipments requiring such protection were loaded in equipment moving to Omaha and at other times they were held in Chicago until such equipment was available for Lincoln. Carriers other than Red Ball provide protective service from Chicago, and Burlington in particular is willing to provide such service to consignee.

A large department store in Lincoln receives shipments from Chicago, Minneapolis-St. Paul, Denver, St. Louis, Kansas City, St. Joseph, and Des Moines. Most of the shipments are received collect. The stores advertising schedules and receipt of merchandise are coordinated and for this reason delays in transportation are avoided as much as possible. Various motor carriers are used for service from Chicago, including Red Ball, Watson, Freightways, and Haeckl. Red Ball transports most of the traffic from Chicago. Generally, it renders second and third morning deliveries, and service from that point, with some exceptions, has been reasonably satisfactory. Carriers used from St. Louis include Burlington and Watson. Generally, Burlington has provided second and third morning delivery

service which is satisfactory. Service from Kansas City is rendered by various carriers, including Red Ball, Watson, and Burlington. Red Ball transports most of its shipments from Kansas City and such service generally has been satisfactory. The service of other origin carriers from Kansas City has been satisfactory, with some exceptions. Freightways is used for most shipments from Minneapolis, and service from Minneapolis-St. Paul is reasonably adequate. Red Ball is used for shipments from St. Joseph, and, with some exceptions, the service has been reasonably adequate. The service from Des Moines and Denver also has been reasonably adequate. Consignee's representative is aware that shipments from Chicago, Minneapolis-St. Paul, Des Moines, and Denver, if transported in single-line service by applicant to Lincoln, would have to move through St. Joseph, providing a circuitous routing. Use of applicant's proposed operation would depend on its ability to render service comparable to that provided by existing carriers.

Omaha—A heating and air conditioning equipment contractor receives most of its traffic from Marshalltown, and occasional shipments from Kansas City, Chicago and Denver. It pays the freight charges on such shipments. Usually, most of the installations are made by consignee between May 15 and October 15 of each year. His storage space is limited and dependable motor carrier service is required for a continuous flow of merchandise. Normally, Bos is used to transport the shipments from Marshalltown to Omaha. Between May 1, and October 1, 1956, the Sheet Metal Workers Union placed certain pickets at the contractor's place of business and at certain job-sites where he was making installations. The pickets were not his employees or former employees. It is indicated that the contractor and his employees had refused to join the Sheet Metal Workers Union. Although Bos continued to deliver

these shipments to Omaha it would not make deliveries direct to the consignee because of the pickets. The consignee, therefore, used his own small truck and some of his skilled employees to pick up shipments at Bos' terminal in Omaha. He then endeavored to use I. N. T. from Marshalltown but that carrier's drivers would not make direct deliveries past the pickets either. Consignee is not aware of any single-line motor carrier service from Marshalltown to Omaha other than Bos and I. N. T. Railroad service has been used also but consignee was required to pick the shipments up at the rail carrier's freight depot. Since about October 1, 1956, Bos has been making deliveries direct to consignee's place of business because the picketing had ceased.

A manufacturer in Omaha, hereafter called shipper, makes various wood products, including frames for upholstered furniture, bases for television sets, and cabinets. Shipments are made to Chicago, Minneapolis, St. Louis, Kansas City, Des Moines, and Denver. Also, inbound shipments of various materials are received from these points. The above-described bases require continual expeditious transportation from Omaha for delivery in Chicago at certain times to coincide with production of the television sets. Cabinets also require expeditious transportation. Prior to October 18, 1956, shipper used numerous motor carriers, including Prucka, Watson, Freightways, Merchants, Independent, Ringsby, and Santa Fe Trail for service to and from its plant. Rail service is used for outbound carload shipments. Shipper, however, does not use less-than-carload service of the railroads very extensively. It prepays some outbound shipments. Shipper routes some inbound shipments, and others are routed by the suppliers. On or about October 11, 1956, a representative of the Upholsterers' International Union of North America, AFL-CIO, requested shipper to rehire certain employees who had been discharged. Additionally, the Upholsterers' Union re-

quested that its business agent be recognized as bargaining representative for shippers' employees. Apparently, the Upholsterers' Union had filed with NLRB unfair labor practice charges against shipper and no determination had yet been made on such charges, and no election had been held by the employees to certify that Union as their bargaining representative. On October 18, 1956, about 15 employees went on strike and approximately 85 continued working. Thereafter, drivers of the carriers which shipper had used formerly would not pass the picket lines to pick up or deliver merchandise. Shipper, therefore, had to engage local cartage companies to pick up or deliver its freight at terminals of the line-haul carriers. Shipper spent about \$500 weekly in obtaining the service of local cartage companies. This situation continued until January 28, 1957, when the unfair labor practice charges were withdrawn by the Upholsterers' Union. Thereafter, the line-haul carriers resumed pick up and delivery service at shipper's plant.

A storage company operates two storehouses in Omaha. General commodities, with some exceptions, are stored for numerous shippers, including some nationally known tobacco manufacturers and certain packinghouses. Generally, the shippers' commodities are moved to the warehouse and reshipments are made from time to time therefrom to various destinations. In some instances, on both inbound and outbound traffic, the storage company is permitted to route shipments. Rail and motor carriers have been used to and from the warehouses, and prior to May 1956, the transportation service was satisfactory. The list of motor carriers which it has used includes Freightways, Watson, D. M. T., Brady, Prucka, Santa Fe Trail, Bos, Darling, Ringsby and Red Ball. In 1956, up until May 18, merchandise (not including household goods) received by motor vehicle at the Omaha storehouses approximated 7 mil-

lion pounds, and a substantial amount of this traffic originated in Chicago, Kansas City, St. Louis, and Minneapolis. Since about May 24, 1956, when a picket of Teamsters was placed at each of the storehouses in Omaha, deliveries by the line-haul motor carriers ceased generally, and only sporadic interstate shipments have been moved to the warehouses by for-hire motor carriers. In some instances shippers did not know there were pickets at the storehouses, and forwarded merchandise to Omaha. This resulted in the tracing of shipments to the terminals of certain carriers, and occasionally shipments had been moved to the storehouses of competitors. Prior to the placement of pickets, Teamsters had requested the storage company to pay its employees established union wage rates. The employees of the warehouses are not members of Teamsters and the latter did not represent them. The storage company has never been advised by the NLRB of any charges being filed with that agency by Teamsters. It had not instituted any action of its own with the NLRB.

Customers were informed of the situation in Omaha, and the storage company began using rail for inbound shipments normally transported by motor vehicle. On June 30, 1956, it lost the account of one large meat packer whose products had been stored in Omaha and reshipped to various points in Iowa, including Marshalltown, Cedar Rapids, Boone, Ames, Des Moines, Davenport, Carroll and Dennison. Because of the existing situation it is said that the storage company is placed at a competitive disadvantage. From time to time since May 24, 1956, it has attempted, without much success, to obtain normal service again direct to the warehouses by the described line-haul motor carriers. Recently, some meat products (which do not require refrigeration) have been transported satisfactorily from Chicago by W. N. Morehouse, Nelson Truck Line, and E. E. Haugarth. Apparently, however, these carriers are re-

stricted to the transportation of packinghouse products. In respect of outbound service, as recently as February 20, 1957, it attempted without success to obtain a pick up by some line-haul motor carriers of a small shipment of personal effects for transportation to Chicago. Generally, the drivers of the line-haul carriers have continued to refuse to pass the pickets at the storehouses.

A representative of the Nebraska Resources Foundation testified in support of the application. Generally, this organization is engaged in bringing in new industries to Nebraska. In recent years it has been instrumental in obtaining the establishment of new factories at certain points in Nebraska, including Lincoln, Kearney, Columbus, Hastings, and Fremont. When attempts are made to induce industries to locate in Nebraska the question of adequate transportation in and out of the new plant sites is important. This representative believes that the more transportation service Nebraska has available the better it will be able to compete with other areas for new industries.

The former owner of Independent, under subpoena by applicant, also testified. Prior to January 1956, Independent interchanged with certain carriers, including Abler, Clark, Lyon, McKay, and Romans. In fact, from January 1 to September 1, 1956, Romans leased terminal facilities from Independent at Omaha. In May of that year, however, Independent refused to interchange certain shipments with Romans. Witness recalled that he understood at that time that Romans was involved in a labor dispute and that the management of Independent was not in a position to order its employees to "either do business or not to do business" with Romans, and that "if the men chose not to do it that was their own responsibility."

Galveston Truck Line Corporation, hereafter called Galveston Truck, intervened in support of the application.

That carrier holds certain certificates from this Commission in No. MC-8544 and subnumbers thereunder authorizing operations in interstate or foreign commerce as a motor common carrier, over irregular routes, of general commodities, with exceptions, from and to certain points and areas in Texas and Oklahoma. It is authorized also to transport specified commodities from and to certain points. In No. MC-8544 (Sub-No. 15) an application is pending before the Commission in which Galveston Truck seeks authority to extend its general commodity operations from and to certain points, including Kansas City, Kans., and the commercial zone thereof. Intervener, a nonunion carrier, is interested in and supports the instant application because it desires to interchange traffic with applicant at Kansas City if its own extension application is approved and applicant obtains the authority sought herein.

The testimony of an inspector at the Nebraska State Railway Commission was also offered by applicant. This testimony involved principally the service rendered by Portis between Grand Island and Ord. Portis interchanges interstate traffic at Grand Island with certain carriers, including Watson, and the evidence indicated that Portis does not render daily service between Grand Island and Ord.

Certain other consignees located at Arcadia, Norfolk, and Ord were present at the hearing in support of the application. It was stipulated by counsel that if called as witnesses their testimony both on direct and cross-examination would be the same or similar to that presented by other witnesses from the same points. If the authority sought is granted, the supporting shippers and consignees generally would route their traffic over applicant's line for connection with the operations of the stockholders, principally at Omaha and Grand Island.

EVIDENCE IN OPPOSITION TO THE APPLICATION.

Evidence in opposition to the application was offered by Burlington, D. C. T., Freightways, I. C. X., Independent, Interstate Motor, Navajo, P. I. E., Red Ball, Ringsby, Santa Fe Trail, and Watson. The evidence presented by these motor carriers also included testimony by representatives of Barber and Roy. On behalf of the railroads evidence in opposition was offered by the Chicago, Burlington and Quincy Railroad Company, Chicago and North Western Railway System, Chicago, Rock Island and Pacific Railroad Company, Missouri Pacific Lines, and Union Pacific Railroad, hereafter called C. B. & Q., C. N. W., C. R. I. P., Missouri Pacific, and Union Pacific, respectively. Each of the opposing motor common carriers held certificates from this Commission authorizing the transportation of general commodities, with exceptions, in interstate or foreign commerce, between various points over specified regular routes. Collectively, the routes over which these motor carriers are authorized to operate coincides substantially with those described in the instant application, and they serve the principal points named therein. Freightway's operations almost completely duplicate those sought, except that it has no routes between Kansas City and St. Louis. Burlington operates between Omaha and Lincoln on the one hand, and, on the other, Chicago, St. Louis, Des Moines, Kansas City, St. Joseph, and Denver, and it serves numerous intermediate points, including Grand Island. Red Ball serves Omaha, Lincoln, and Grand Island, and numerous other Nebraska communities, and its routes extend from those points to Denver, Kansas City, St. Joseph, Chicago, and Sioux City. Watson also serves numerous Nebraska communities, including Grand Island, Norfolk, Fremont, Columbus, Omaha, and Lincoln, and its routes extend from those points to Minneapolis-St. Paul, Des Moines, Chicago, Kansas City,

St. Joseph, St. Louis and Denver. It also serves Marshalltown. It renders daily service from Omaha to Lincoln, Fremont, Columbus, Grand Island, and Hastings. Ringsby's operations between Denver and Chicago via Omaha and Des Moines, includes service to various Nebraska points, including Lincoln, Grand Island, Fremont, Norfolk, and Sioux City. Generally, however, unless Ringsby has a truckload for Norfolk, service to that point is rendered by interchange. Similarly, although Independent holds authority to serve Lincoln, it interchanges less-than-truckload shipments moving to or from Lincoln with connecting carriers at Omaha. Truckloads, however, are delivered to Lincoln direct. Freightways can render direct service between Marshalltown and Omaha.

Terminals are maintained by protestant motor carriers at various points in the area involved. Most of them have terminals at Denver, Omaha, Chicago, and Kansas City, and some have terminals at St. Joseph, St. Louis, and Lincoln. Certain of the carriers have terminals at St. Paul, Sioux City, Des Moines, Grand Island, the Freemont. Additionally, Watson has a terminal at Columbus, which is shared with another carrier. These protestants operate numerous motor vehicles including certain refrigerator equipment. Service is rendered daily by them between the principal points they are authorized to serve, and normally they use either a relay system or two drivers on a vehicle for continuous operation of their equipment between terminals. For example, Watson operates overnight schedules between Omaha, on the one hand, and, on the other Chicago, Denver, Des Moines, Kansas City, St. Louis, and Minneapolis-St. Paul; and second morning service between Chicago and Denver. Daily service is rendered from Chicago, St. Louis, Kansas City, St. Joseph, and Denver to Lincoln. Red Ball operates daily schedules between Chicago, on the one hand, and, on the other, Omaha,

Lincoln, Sioux City, and Denver; between Kansas City, on the one hand, and, on the other, Omaha, and Lincoln, including service at St. Joseph; between Omaha and Denver, and Omaha and Sioux City. Overnight schedules are operated by Red Ball in the majority of instances, although it is apparent that operations between Chicago and Denver would take longer resulting in second morning or second day service. Service rendered by D. C. T. between Chicago and Denver, and between St. Louis and Denver is second morning or second day. Interstate Motor also offers second morning service between Chicago and Denver, and between Kansas City and Denver. Independent offers second morning service between Chicago and Denver, and so does Freightways.

Generally, the equipment of the opposing motor carriers is not being operated to capacity, and they are in a position to transport additional traffic. Interstate Motor transports more traffic westbound from Chicago and Kansas City to Denver than it does in the reverse direction. It is anxious, therefore, to obtain additional eastbound traffic from Denver. I. C. X. also desires to obtain additional traffic from Denver moving eastbound to balance its westbound operations from Chicago. Ringsby is interested, among other things, in obtaining additional traffic from Chicago and Denver into Omaha where it has established its own terminal. Representatives of the opposing carriers believe a grant of the authority sought herein would affect protestants adversely. Freightways, for example, suffered a decline in gross revenue in 1956 of about \$200,000, and it made only a slight profit in 1956.

The opposing motor carriers transport a considerable volume of traffic between the points they serve and they interchange with connecting carriers at various points. Omaha is one of the principal points for interchange of traffic, and considerable interchange is performed at Lin-

coln, Grand Island, and Sioux City by certain of the opposing motor carriers. Certain of the evidence pertaining to interchange at Omaha, Lincoln, Sioux City and Grand Island is pertinent here. Burlington offered exhibits covering generally a period during the last six months of 1956, and January 1957. This evidence shows that Burlington has continued to interchange with applicant's stockholders at Omaha and Lincoln on interstate traffic originated at or delivered to various points in Nebraska. Specifically, numerous interstate shipments were received by Burlington at Omaha from McKay, Clark, and Abler, and some from Romans, Superior, and Lyon. Numerous interstate shipments were transferred at Omaha to Romans, McKay, Clark, and Abler. During the same period of time Burlington interchanged numerous interstate shipments with McKay and Lyon at Lincoln. Some of the shipments included in Burlington's exhibits cover shipments of certain supporting shippers or consignees, originating at or destined to Norfolk, Arcadia, Sargent, Ord, Fairbury, Neligh, and Burwell.

In 1955, and 1956, at Omaha, Santa Fe Trail interchanged interstate traffic moving from and to Nebraska points with Abler, Wilber, Clark, Peters, Lyon, McKay, Pawnee Transfer, Romans, and Steffy; also, with Superior Transfer, in 1956. In most instances Santa Fe Trail delivered considerably more traffic to these carriers than it received. During the same years at Lincoln it interchanged traffic with McKay, and in 1956, with Winter and Tillman.

A representative list showing a portion of the interstate shipments interchanged by Independent at Omaha during 1956 (except January) shows that most of the traffic was given to Roy for delivery to Norfolk, Pierce, Newman Grove, Neligh, Meadow Grove, and Tilden. Certain shipments for Ord, North Loup, and Loup City were transferred to Arrow. United Freight received some for

Loup City, Ord, and Burwell, and a carrier named Burnham received a shipment for Burwell. With respect to certain unrouted shipments for Norfolk and Pierce, which were transferred to Roy, examination by applicant's counsel of the freight bills covering such shipments revealed that "Abler" had been written thereon by Independent's routing clerk and then scratched over in favor of Roy.

An exhibit offered by Red Ball shows that it interlined approximately 430 shipments at Omaha in November 1956 destined to various Nebraska points which are served either by Abler, Clark, Lyon or Romans. All of these shipments, however, were given to carriers other than Abler, Clark, Lyon and Romans for delivery. The list of connecting carriers which delivered the shipments includes Schuyler Transfer, Interstate Freight Lines, and Mauch Transfer, hereafter called Schuyler, Interstate Freight, and Mauch, respectively, and Roy, Heuton, Brandt, and Service Oil. During the same month Red Ball received about 17 shipments collectively, from Roy, Schuyler, Interstate Freight, Mauch and Brandt, for movement to points beyond Nebraska.

A representative list of over 500 interstate less-than-truckload shipments interchanged at Sioux City by Watson on traffic moving to Nebraska points, from May 1, 1956 to and including January 31, 1957, shows Middlewest as the connecting carrier in most instances, with Barber and D. & T. Transfer, hereafter called D. & T., receiving some shipments. Many of the shipments originated at points on the routes over which applicant seeks to operate. Routings on about 40 of the shipments were disregarded by Watson and given to a carrier other than the one specified. During the same period of time Watson interchanged numerous interstate shipments at Omaha destined to points in Nebraska, and in certain instances disregarded the routings shown on the freight bill. Watson also offered

evidence showing interchange of 94 interstate shipments at Grand Island, between September 27, 1956 and January 16, 1957, destined to Ord. All of these shipments were transferred to Portis, although 21 were routed for delivery by Romans. In respect of service involving the supporting department store at Lincoln, during the last 8 months of 1956, a representative list shows Watson delivered directly to the store numerous shipments which originated at Kansas City, St. Louis, Minneapolis, St. Paul, Chicago, and St. Joseph, and the transit time in most instances was one or two days. An exhibit was offered also by Watson showing that it had transported numerous shipments originating at various points beyond Nebraska, including Kansas City, Chicago, Minneapolis, St. Paul, St. Louis, Denver, and St. Joseph directly to Columbus.

An exhibit of Freightways shows that this protestant from January 20 to September 4, 1956, interchanged over 900 less-than-truckload interstate shipments at Sioux City, and Omaha collectively, destined to various points in Nebraska. A considerable amount of this traffic originated at numerous points on the routes over which applicant seeks authority, and the list of connecting carriers to which the shipments were given at Omaha and Sioux City includes Middlewest, Roy, Brandt, Schnyler, Interstate Freight, Arrow, Heuton, D. & T., Mauch, Superior, Wilber, Abler, Romans, McKay, and Steffy. Considering the number of shipments involved, applicant's stockholders received a small amount of traffic compared to that given to Middlewest, Interstate Freight, and some of the other connecting lines. Shipments to Fremont were transported directly to that point by Freightways. Although Freightways can serve Norfolk, O'Neill, Valentine, Columbus, Grand Island, Hastings, West Point, Neligh, and Schuyler, Nebr., on certain days it does not have sufficient freight to justify operation of a vehicle to those points and the traffic

is interchanged with connecting lines to expedite deliveries. Numerous shipments were transported by Freightways from Chicago, St. Paul, Denver, and Kansas City to the described department store at Lincoln, from July 30, 1956 through January 29, 1957; generally, transit time on the Chicago, St. Paul and Denver shipments ranged from two to three days, and the Kansas City shipments from one to three days.

Barber, since about January 2, 1957, has operated under the general commodity certificate formerly held by Midwest in No. MC-30857. That certificate authorizes operation in interstate or foreign commerce over specified routes between Ainsworth, Nebr., and Sioux City, and between Neligh and certain other points in Nebraska. By certain recently acquired general commodity authority, Barber also operates between Valentine and Omaha over certain specified regular routes. It maintains terminals at certain points, including Omaha and Norfolk, and operates numerous vehicles. One of its vehicles leaves Omaha daily at about 5:30 p.m., for various Nebraska points it is authorized to serve.

Roy is authorized to transport general commodities, with exceptions, between Omaha and Norfolk over U. S. Highway 275; and between Columbus and Fremont, over U. S. Highway 30, serving all intermediate points. He is authorized also to transport general commodities, with exceptions, from "Norfolk and vicinity to" and from Ainsworth, Nebr., and occasionally to and from points in the State of Nebraska at large", with certain restrictions. He operates six tractors, six trailers, and two trucks, and maintains terminals at Omaha, Norfolk, and Fremont. An exhibit offered in evidence shows that Roy received numerous interstate shipments at Omaha in December 1956, and in January 1957, from various carriers for movement to Nebraska points beyond Norfolk, and it transferred such shipments

to Clark at Norfolk. In 1956, Roy received from various carriers at Omaha numerous interstate shipments destined to Norfolk which were delivered to that point directly by Roy. The witness representing Roy admitted that certain shipments transported to the Young Mens Christian Association in Norfolk have been refused because they had been routed for delivery by Clark.

As here relevant, C.R.I.P. operates over a network of rail lines extending from Chicago, on the east to Denver, on the west via Des Moines, Omaha, and Lincoln, and from Minneapolis-St. Paul, on the north to St. Louis and Kansas City, on the south. In addition to Omaha and Lincoln, it serves certain other points in southeastern Nebraska. It also serves St. Joseph. It renders daily merchandise car service between Chicago, on the one hand, and, on the other, Omaha, Denver, St. Louis, Kansas City, and Minneapolis-St. Paul; between Denver, on the one hand, and, on the other, St. Louis, Kansas City, and Omaha; and between Kansas City and St. Paul. C. N. W. as here material, operates over a system of rail lines extending from Chicago, on the east, to Lander, Wyo., on the west, via Omaha, Norfolk, and Chadron, Nebr., and from Minneapolis-St. Paul, on the north, to Des Moines, and Lincoln, on the south. Its lines also extend to numerous points in southeastern Nebraska, including Superior. Among other things, it operates through less-than-carload merchandise cars daily between Chicago and Omaha, and between Minneapolis-St. Paul and Omaha.

C. B. & Q., operates over a network of rail lines extending from Chicago, on the east to Denver on the west, via Omaha and Lincoln, and between Minneapolis, on the north and St. Louis, Kansas City, and St. Joseph on the south. In addition to Omaha and Lincoln, it serves numerous other points in various areas of Nebraska, including Grand Island. C. B. & Q., offers through less-than-carload

merchandise car service between Chicago on the one hand, and, on the other, Omaha, Kansas City, Minneapolis-St. Paul, and St. Louis; between St. Louis and Kansas City, on the one hand, and, on the other, Omaha and Denver; and between St. Joseph and Omaha.

Missouri Pacific's lines, as here relevant, extend from St. Louis to Omaha, Lincoln, and certain other points in southeastern Nebraska, via St. Joseph and Kansas City. This protestant operates two less-than-carload merchandise cars daily between St. Louis and Omaha; one merchandise car between St. Louis and St. Joseph daily, and at least one daily between Kansas City and Omaha. The above-named rail protestants handle carload as well as less-than-carload traffic between the points they serve, and interchange such traffic with connecting railroads for transportation to and from points between their own lines. They are ready, willing, and able to transport additional traffic. All of the points on the above-named protestants' rail lines pertinent to the instant application are not open and prepay stations.

Union Pacific's lines, as here pertinent, extend from Council Bluffs, Iowa, Omaha, Kansas City, and St. Joseph, on the east to Denver on the west. In addition to Omaha, it serves numerous points in Nebraska, including Lincoln, Grand Island, and North Platte. Although most of the Nebraska points it serves are open stations, some do not have any agent of their own and are served from another station nearby. Union Pacific operates scheduled freight trains between various points, including service between Council Bluffs (Omaha) and Kansas City; between Lincoln and St. Joseph, and between Council Bluffs (Omaha) and Denver. It interchanges traffic with other railroads at various points, including Council Bluffs, Kansas City, and Denver. In connection with other railroads, it participates in merchandise car service between Chicago and

Denver; between St. Louis, on the one hand, and, on the other, Omaha, North Platte, and Denver; St. Louis and Kansas City, and between Minneapolis-St. Paul and Omaha. It also renders merchandise car service on its lines between Denver and Kansas City, and between Denver and Omaha. It transports carload as well as less-than-carload traffic, and can render additional service of this nature.

BRIEFS.

In its brief, applicant argues principally that the free flow of interstate commerce via motor carrier has been obstructed and impeded through the failure and refusal of protestants and other unionized carriers to give the required service; that such obstruction deprives many Nebraska communities of needed interstate transportation service from or to manufacturing and distributing points outside Nebraska; that Omaha business concerns supporting the application are entitled to door-to-door service in order to remain in business on a competitive basis; that a formal complaint is not the only remedy available; that the application is based solely on public convenience and necessity; that the evidence shows there is a real demand and need for the proposed service; that when protestants and other line-haul carriers refuse to provide their respective portion of the through movement, the Commission has no alternative but to authorize another carrier who will perform the required service to enter the field, and that it is fit and able to conduct the motor carrier operations proposed.

In their briefs, protestants assert that the application be denied. They argue principally that applicant has not shown that the existing transportation service between the points involved is inadequate; that it has failed to prove the stockholders of applicant are unable to conduct

interchange operations with existing line-haul carriers; that, if applicant's allegations of refusal to interchange are true, a complaint should be filed by the stockholders with this Commission instead of an application for authority; that motor carriers are not enjoined by part II of the act to follow designated routings; that the matters involved herein are within the exclusive jurisdiction of the NLRB; that if applicant's stockholders are involved in alleged secondary boycott activities on the part of Teamsters, they have an adequate remedy in the courts and before the NLRB. It is contended further that the power to issue certificates granted by Congress to this Commission was never intended to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes, and that grants of authority based on evidence of the sort presented herein would result in two types of carriers, union and nonunion. Rail carriers contend that they should not be confronted with another common carrier competitor operating along their principal routes simply because of the labor differences of several nonunion motor carriers serving various interior Nebraska communities. They also question applicant's fitness and ability to conduct the extensive operations sought.

DISCUSSION AND CONCLUSIONS.

Before discussing the merits of the application the question of jurisdiction raised on brief should be resolved. The common carrier application here was filed under Part II of the Interstate Commerce Act for the issuance of a certificate which, if granted, would authorize applicant to transport general commodities, with exceptions in interstate or foreign commerce, between various points. Section 206(a) of the Interstate Commerce Act prohibits any common carrier by motor vehicle from operating in interstate or foreign commerce unless and until it holds a cer-

tificate of public convenience and necessity from the Commission. Section 204 of the same act reads, in part, as follows:

"(a) It shall be the duty of the Commission (1) to regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service * * *";

Section 202(a) of the act reads as follows:

"The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission."

Section 10(a) of the Labor Management Relations Act, 1947, usually referred to as the National Labor Relations Act, hereafter called Labor Act, reads in part as follows:

"The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

and under section 10(c) NLRB can issue an order and notice as set forth in appendix C hereto.

Of the 12 stockholders of applicant, Clark is the only one who has sought relief from NLRB, and is the only one who had employees on strike. The other stockholders have not sought relief from NLRB, do not have employees on strike, and certainly in respect of the application herein, as to them, there can be no valid claim that this Commission is injecting itself into the area of labor relations and collec-

tive bargaining. Such stockholders believe there is need for additional transportation service based principally on the refusal of certain line-haul carriers to interchange traffic with them. In addition to the testimony of the stockholders themselves, evidence was presented by certain public and shipper witnesses on the question of need for the proposed service. The subject matter here for consideration is an application under section 207(a) of the Interstate Commerce Act and disposition of the proceeding requires, among other things a determination of whether the service proposed in the application or any portion thereof is or will be required by the present or future public convenience and necessity, and deciding the issues therein by the Commission does not conflict with the decision in *Garner v. Teamsters Union*, 346 U. S. 485, where it was held that the grievance of a trucking company against picketing by Teamsters (Local 776) was a matter to be decided by NLRB and not by a State tribunal. In that proceeding a State labor board was endeavoring to occupy the same field in which the NLRB is engaged. Where transportation is involved under the Interstate Commerce Act, however, and the duties of common carriers thereunder are involved with respect to the service rendered to the shipping public, it is clear that the Labor Act did not give NLRB exclusive power, particularly where the statute of another regulatory body is violated. *Quaker City Motor P. Co. v. Inter-State Motor Fr. Sys.*, 148 F. Supp. 226. Reference to appendix C hereto (the NLRB order) shows Teamsters are directed to cease and desist from certain secondary boycott activities against Clark "or any other common carrier by motor vehicle in the area" over which Teamsters Local 554 has jurisdiction. In other words, the protection afforded to Clark by the NLRB order against secondary pressures was extended to other motor carriers in the area which the union was attempting to organize.

The fact that NLRB has issued an order in this matter; however, does not preclude the Commission from considering whether additional motor carrier facilities are needed, or other action should be taken under the Interstate Commerce Act because of the interchange difficulties in which certain of applicant's stockholders are involved. The NLRB order directs a union local to cease and desist from certain activities. A Commission order would be directed to an interstate motor carrier or carriers. See *Montgomery Ward & Co. v. Santa Fe Trail Transp. Co.*, 42 M. C. C. 212, discussed elsewhere herein. The examiner concludes that the Commission has jurisdiction properly to consider the transportation matters involved in the instant application.

Before the Commission may grant a certificate of public convenience and necessity under section 207(a), it is necessary to consider, among other things, (1) whether the new operation or service will serve a useful purpose, responsive to a public demand or need; (2) whether this purpose can and will be served as well by existing lines or carriers; and (3) whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation*, 1 M. C. C. 190, 203. Any order authorizing such a certificate would have to include a finding to the effect that there was no existing service in operation between the points or over the area applied for or that such service was inadequate or that existing carriers could not furnish and are not satisfactorily furnishing the service required. *Inland Motor Freight v. United States*, 60 F. Supp. 520. It is clear from the facts in the instant proceeding that this application is not based on the usual evidence presented in proceedings of this kind. Some protesting unionized motor carriers have refused to interchange traffic with

certain stockholders of applicant who are not unionized, and it is applicant's position that this constitutes an inability or unwillingness on the part of existing carriers to provide adequate and reasonable service to the shipping public in the involved territory. Applicant cites a number of cases in its brief to sustain the claim that the unionized line-haul carriers, including protestants, are unable or unwilling to provide service, notably *Meier & Pohlmann Furniture Co. v. Gibbons*, 113 F. Supp. 409, 233 F. 2d 296; *Montgomery Ward and Company, Inc. v. Santa Fe Trail Transp. Co.*, *supra*; and *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M. C. C. 719.

As indicated, applicant relies heavily on the claim that the existing line-haul motor carriers have refused to interchange with the stockholders named herein. There is no evidence, however, showing that Derickson, Frear (who operates Pawnee Transfer and Superior Transfer), Steffy, Tillman, Wilber and Winter have had any particular trouble in interchanging shipments with connecting lines, and Peters was still interchanging traffic with a considerable number of the line-haul motor carriers. In any event, most of Peters' interchange at Omaha is effected with National Carloading. As to Abler and McKay, they were still interchanging traffic with Burlington, Ringsby and Santa Fe Trail, and Romans was still able to conduct interchange with Burlington, Ringsby, Rock Island and Santa Fe Trail. Lyon was still interchanging traffic with Burlington at Lincoln, and at Omaha with Bos, Burlington, Ringsby, D.M.T., and Merchants. As to Clark, the evidence shows Santa Fe Trail has continued to interchange traffic and in most instances this stockholder has been able to find a motor carrier willing to accept interstate shipments.

Although the shipper evidence relating to interior Nebraska points indicates there have been some delays in transit, principally because shipments have been diverted

to carriers other than those designated by the consignees, the shipments have been moving through to destination. There is a question, however, what effect this diversion of traffic which has taken place within Nebraska, has on the issue of public convenience and necessity involved herein.

Although Part II of the act does not specifically grant to shippers the right to designate the routes by which their property should be transported by motor common carriers, such carriers are charged with the duty under section 216(b) of the act, to establish, observe and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and it has been held that misrouting is an unreasonable practice under certain conditions. *Eastern Aircraft v. Fred Olson & Son Motor Service Co.*, 47 M. C. C. 363. *Metzner Stove Repair Co. v. Ranft*, 47 M. C. C. 151. In the latter case the shipper had specified a certain interchange carrier but the originating carrier had ignored the routing which resulted in shipments being transported over another route at a higher rate. A consignee who exercises control over shipments is a shipper. *United States v. Metropolitan Lbr. Co.*, 254 Fed. 335. Part I of the act, section 15(8), dealing with the railroads, specifically provides that shipper routings must be observed, and section 15(9) gives a cause of action to the rail carrier who suffers a loss of traffic by misrouting. The examiner is informed on protestants' briefs that there is presently pending in Congress a bill which would so amend Part II of the act as to specifically provide, as is now provided in Part I of the act, that a motor carrier subject to Part II must observe and follow shippers' specified routings. If legislation to this effect is passed, such a statute should help correct the misrouting abuses revealed herein. Presently, however, the carriers injured by misrouting can file a complaint, where it could be determined whether the practices

alleged are just and reasonable. In any event, since the Commission has not had an opportunity to pass on these misrouting practices as they affect the particular stockholders involved, it is illogical to assume that the Commission can do nothing by way of a complaint proceeding. If nothing can be done in that manner, then other steps could be taken. In the meantime, however, considering the circumstances involved, and in the absence of specific legislation under Part II regarding misrouting, an extensive grant of operating rights between Omaha and Lincoln, on the one hand, and, on the other, Chicago, Denver, St. Louis, St. Joseph, Minneapolis and Des Moines would not be justified, particularly since the diversions or mis routings have taken place principally within Nebraska.

In regard to the shipper evidence relating to Lincoln, the facts show that the existing carriers generally are giving good service to the involved retail stores, and there is no substantial basis to authorize additional motor carrier service to or from that point.

As to Omaha, the evidence shows, with respect to the air-conditioning contractor, that Bos has been making deliveries direct to consignee's place of business since about October 1, 1956, and that picketing at the contractor's place of business had ceased. Similarly, after January 28, 1957, the line-haul carriers resumed pickup and delivery service at the manufacturer of frames for upholstered furniture when the Upholsterers' Union withdrew its charges of unfair labor practices. Thus, as to these business establishments no need has been shown for the additional service proposed.

In regard to the warehouse operator, the evidence shows its premises were still picketed by Teamsters. In the *Meier & Pohlmann* case, *supra*, a furniture company in St. Louis was involved in a strike of its workers which belonged to a union certified by NLRB. The strikers set up a picket

line. Thereafter, pickup and delivery service by carriers practically ceased. The motor carrier defendants there claimed that they were excused from furnishing pickup and delivery service by their impracticable delivery tariff. This tariff in substance stated that there was nothing therein which would require the carrier to perform pickup or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of "any riot, strike, picketing or other labor disturbance." The Court pointed out that it was not concerned with the question of the validity of the tariff but only with the construction and interpretation thereof. After an appraisal of the evidence, the court concluded that the defendant carriers were excused from performing the pickup and delivery service to which plaintiff therein claimed it was entitled. In making this determination the court stated: "Because of the foregoing conclusion we do not reach the question of whether a proper construction of the impracticable operation tariff would excuse performance by the carriers if only peaceful picketing had been present or had been involved." The facts in that case had indicated there was some violence and peace disturbance during the existence of the picketing. The action therein included a request for a permanent injunction and it was indicated that under the Norris-LaGuardia Act it was necessary to show, among other things, that unlawful acts had been threatened and would be committed unless restrained or that such acts had been committed and would be continued unless restrained.

In the instant proceeding while the facts indicate that the warehouse operator in Omaha has been the subject of organizational or recognition picketing and there has been no strike of its employees, it is apparent that a labor dispute is in progress in which Teamsters seek to have the employer pay established wage rates. In *Garner v.*

Teamsters, supra, where Teamsters had resorted to organizational picketing to induce a storage and transfer company in Pennsylvania to join the union and "gain union wages, hours, and working conditions", the Supreme Court concluded that Teamsters were subject to being summoned before the NLRB to justify their conduct, and that on the basis of the allegations the Pennsylvania storage company could have presented its grievance to the NLRB. In that case picketing was orderly and peaceful, but drivers for other carriers refused to cross the picket line. A motor common carrier of freight, in interstate or foreign commerce, has certain duties and responsibilities toward the public. It is under a duty to shippers to furnish service under its tariffs to the limit of its capacity to do so upon reasonable demand. *Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co.*, 215 F. 2d 126. Whether the line-haul carriers in the instant proceeding are violating their common carrier duty in not performing pickup and delivery service is properly the subject of a complaint proceeding. In *Montgomery Ward Co., Inc. v. Santa Fe Trail Transp. Co., supra*, a complaint proceeding, it was found that refusal by certain motor carriers to make pickups and deliveries was unlawful and in violation of section 216 of the act. In that proceeding, however, picketing was resorted to for the sole purpose of forcing a shipper to patronize a particular carrier. Montgomery Ward in Kansas City had terminated its contract with a local transfer company and entered into a new one with Railway Express for transportation of local mail and miscellaneous freight. The drivers of the express company were members of one union and the drivers of the transfer company were members of Teamsters who established a picket line simply because the transfer company lost its contract. The warehouse operator in the instant proceeding has taken no action before this Commission in the way of a complaint, and

evidently has not requested any action by NLRB. In addition to these regulatory agencies, it has recourse to the courts for an injunction. See *Quaker City Motor P. Co. v. Inter-State Motor Fr. Sys.* *supra*. Its traffic is getting through to its warehouses by railroad, and it also receives some direct delivery service by motor carriers of specific commodities. In the circumstances, the evidence with respect to proposed service to and from Omaha does not justify any grant of additional authority.

As previously indicated, there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that the real parties in interest who are aggrieved by this practice should file a complaint with this Commission under Part II of the act. In any event, since no complaint has been filed by any of applicant's stockholders with this agency, the Commission has not had an opportunity to test the effectiveness of that procedure. Certainly it cannot be assumed that the Commission's procedure thereunder would be ineffectual. Although applicant cites the *Planters Nut* case, *supra*, to sustain its argument that additional motor carrier authority is needed to correct the situation, it should be borne in mind that that was a complaint case and the Commission issued an order requiring certain specified carriers to cease and desist from certain interchange practices found to be unlawful. In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and, if a certificate is granted on the evidence herein those protesting carriers who have been continuing to interchange normally would be injured along with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to

the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions of the routes involved and the shipments are moving through to destinations.

The examiner concludes that the application should be denied. In view of this conclusion, it is not deemed necessary to discuss the question of applicant's fitness and ability to conduct the proposed operations. Also, in view of this conclusion the examiner does not deem it necessary to discuss the necessity of the involved stockholders seeking approval under section 5 of the act to control applicant through ownership of stock or otherwise. Furthermore, since denial of the application is recommended it is not necessary to consider what effect a grant of operating rights would have on certain of applicant's stockholders who operate under the second proviso of section 206a of the act and are presently permitted to handle interstate traffic solely within Nebraska without a certificate from this Commission.

FINDINGS.

The examiner finds that applicant has failed to establish that the proposed operation is required by the present or future public convenience and necessity, and that the application should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Donald R. Sutherland, Examiner.

(Signature) Donald R. Sutherland.

No. MC-N6067

Appendix A (to Sutherland Report).

Nebraska Short Line Carriers, Inc.

DESCRIPTION OF AUTHORITY SOUGHT.

Authority to operate as a common carrier, over regular routes, transporting: General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (1) between Denver, Colo., and Chicago, Ill., from Denver, over U. S. Highway 6 to junction U. S. Highway 138, thence over U. S. Highway 138 to junction U. S. Highway 30, thence over U. S. Highway 30 to junction U. S. Highway 30A near Clarks, Nebr., thence over U. S. Highway 30A to junction U. S. Highway 30 at Missouri Valley, Iowa, thence over U. S. Highway 30 to Aurora, Ill., thence over Illinois Highway 65 to junction U. S. Highway 34, and thence over U. S. Highway 34 to Chicago, and return over the same route; (2) between Omaha, Nebr., and Chicago, Ill., from Omaha over U. S. Highway 6 to junction Alternate U. S. Highway 66, thence over Alternate U. S. Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route, serving no intermediate points, as an alternate route, for operating convenience only, in connection with applicant's proposed route in (1) above; (3) between Minneapolis, Minn., and Des Moines, Iowa, over U. S. Highway 65; (4) between Council Bluffs, Iowa and St. Louis, Mo., from Council Bluffs over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S.

Highway 40, thence over U. S. Highway 40 to St. Louis, and return over the same route; and (5) between Lincoln, Nebr., and St. Joseph, Mo., from Lincoln over U. S. Highway 34 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction U. S. Highway 36, thence over U. S. Highway 36 to St. Joseph, and return over the same route. Serving all intermediate points on routes (1), (3), (4), and (5), and the off-route points of Waterloo and Marshalltown, Iowa.

Appendix B (to Sutherland Report).

APPLICANT'S COMMON CARRIER TEMPORARY AUTHORITY IN
No. MC-116067 (SUB-NO. 1) TA.

General commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over regular routes.

Between Omaha, Nebr., and Chicago, Ill., with inter-line privilege at Omaha:

From Omaha over U. S. Highway 6 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chicago, and return over the same route.

Service is not authorized at intermediate points.

Between Omaha, Nebr., and St. Louis, Mo., with inter-line privilege at Omaha:

From Omaha over U. S. Highway 275 to junction U. S. Highway 34, thence over U. S. Highway 34 to junction U. S. Highway 71, thence over U. S. Highway 71 to junction U. S. Highway 40, and thence over U. S. Highway 40 to St. Louis, and return over the same route.

Service is authorized at the intermediate point of Kansas City, Mo., except on shipments moving to or from St. Louis.

Appendix C (to Sutherland Report).

COPY OF NATIONAL LABOR RELATIONS BOARD ORDER
AND NOTICE.

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 554, AFL-CIO, its officers, representatives, agent, successors, and assigns, shall:

1. — Cease and desist from:

(a) Engaging in, or inducing or encouraging the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, or (2) to force or require Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which Respondent has jurisdiction, to recognize or bargain with Respondent as the collective bargaining representative of their employees, respectively, unless and until the Respondent has been certified as the representative of such employees in accordance with the provisions of Section 9 of the National Labor Relations Act;

(b) Engaging in any or all of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Forthwith notify all its members who are employed by employers other than Clark Bros. Transfer Company and Coffey's Transfer Company, and all employees of said employers who are represented by it, that it has no objection to their transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company. Such notice shall be in addition to that conveyed by the posting of the notices specified in paragraph (b), below;

(b) Post at its business office at Omaha, Nebr., copies of the notice attached hereto as an Appendix¹¹.

11. In the event that this Order is enforced by a decree of a United States Court of Appeals, this notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, GENERAL DRIVERS
AND HELPERS LOCAL 554, AFL-CIO.

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage the employees of any employer (other than Clark Bros. Transfer Company or Coffey's Transfer Company) to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services for their respective employers where an object thereof is (1) to force or require any such employer, or any other employer or person, to cease doing business with Clark Bros. Transfer Company, or Coffey's Transfer Company, or any other common carrier by motor vehicle in the area over which we have jurisdiction, or (2) to force or require Clark Bros. Transfer Company or Coffey's Transfer Company, or any common carrier by motor vehicle in the area over which we have jurisdiction to recognize or bargain with the undersigned union as the representative of their employees unless and until certified by the National Labor Relations Board.

WE WILL NOT engage in any of the foregoing conduct by instigating or enlisting joint or concerted action of other Teamsters locals, wherever situated.

WE HAVE NO OBJECTION to the action of the employees of any employer other than Clark Bros. Transfer Com-

pany and Coffey's Transfer Company in transporting or handling, in the course of their employment, freight shipped by or destined for shipment by Clark Bros. Transfer Company and Coffey's Transfer Company; and we will give specific notice to that effect to all our members who are employed by any such employer and to all other employees of such employers who are represented by us.

**INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, GENERAL
DRIVERS AND HELPERS LOCAL No. 554,
AFL-CIO.**

By
(Representative) (Title)

Dated

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent's official representative shall also sign copies of the said notice which the Regional Director shall submit for posting, the employers willing, at the premises of Clark Bros. Transfer Company and Coffey's Transfer Company (if it resumes operations), and at the Omaha premises of the other

employers named in footnote 38 of the Intermediate Report¹²;

(c) Notify the Regional Director for the Seventeenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., December 26, 1956.

BOYD LEEDOM,

Chairman,

PHILIP RAY RODGERS,

Member,

STEPHEN S. BEAN,

Member,

(SEAL)

NATIONAL LABOR RELATIONS BOARD.

Recommended by Donald R. Sutherland,
Examiner,

(Signature) DONALD R. SUTHERLAND.

12. There shall be inserted in the caption of said notices, following the name of the Respondent, the words "And to All Employees of" followed by the name of the employer at whose premises the said notice is to be posted.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on the
..... day of A.D. 1957.

No. MC-116067.

NEBRASKA SHORT LINE CARRIERS, INC. COMMON CARRIER
APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

IT IS ORDERED, That the said application be, and it is hereby, denied.

AND IT IS FURTHER ORDERED, That this order shall be effective on

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D.

No. MC-116067 (Sub-No. 2)

NEBRASKA SHORT LINE CARRIERS, INC.

COMMON CARRIER APPLICATION.

REPORT AND ORDER.

RECOMMENDED BY MICHAEL B. DRISCOLL, *Examiner*.

Nebraska Short Line Carriers, Inc., of Lincoln, Nebr., by application filed January 10, 1957, as amended, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities (except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk, those requiring special equipment, and stone, cut or uncut, finished or in the rough), between Omaha, Nebr., on the one hand, and, on the other, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

Under appropriate orders, the application was heard at Omaha, April 4-5, 9-12, and 15-17, 1957. The application is opposed by numerous rail carriers, by a relatively large number of motor carriers, and by General Drivers and Helpers Union, Local 554, of Omaha, affiliated to International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, A. F. L.-C. I. O.

Certain motor carriers are referred to herein by abbreviated names. Those names and the corresponding full names will be shown below. Unless otherwise shown herein, all those are motor common carriers of general commodities, with more or less standard exceptions, and all operate over regular routes.

<u>Abbreviated Name:</u>	<u>Name of Carrier:</u>
Romans	John Jack Romans
Clark	Fred L. and Walter F. Clark
Abler	Abler Transfer, Inc.
Burlington Truck	Burlington Truck Lines
Santa Fe Trail	The Santa Fe Trail Transportation Company
McKay	C. C. and Earl R. McKay
Lyon	Royal F. Lyon

All rulings on appearances, motions, amendments, and objections have been reviewed and further considered, and they are hereby affirmed.

All evidence has been studied and weighed. No one would be helped and no good nor useful regulatory purpose would be served by writing down all that voluminous evidence. Instead of all that, the intermediate or ultimate facts will be stated in most instances; and, from those facts, first preliminary and then ultimate conclusions will be drawn. For reference purposes, numbered divisions will be used.

1. Omaha, with a 1950 population of 251,117, is both a railroad and trucking center. Ten rail systems and numerous truck lines operate through or to that centrally located city.

2. All the rail carriers are more or less fully unionized, and all or nearly all the larger trucking companies are unionized under contracts with the Teamsters Union. Those

Teamster contracts almost invariably contain the so-called hot cargo provisions, which read:

"It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs or lockouts exist.

The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement.

The Union shall give the Employer notice of all strikes and/or the intent of the Union to call a strike of any Employer and/or place of business, and/or intent of the members to refuse to handle unfair goods. The carriers will be given an opportunity to deliver any and all freight in their physical possession at the time of the receipt of notice.

Any freight received by a carrier up to midnight of the day of the notification shall be considered to be in his physical possession. However, freight in the pos-

session of a connecting carrier shall not be considered to be in the physical possession of the delivering carrier."

The insistence by any Employer that his employee handle unfair goods or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any need of the Union to go through the grievance procedure herein."

3. Differing from those larger trunkline carriers, are a number of small, or relatively small, eastern Nebraska motor carriers, which are not unionized, and which use Omaha as a principal or important interchange point with the larger unionized carriers. Some may also use Grand Island or Lincoln, Nebr., Sioux City, Iowa, or possibly other places as points of interchange, but all or practically all use, and logically must use, Omaha for much or most of their jointline traffic.

4. As early as 1954, in some instances, and certainly by 1955, in most instances, the Teamsters Union began to show interest in those eastern Nebraska carriers. Some, like Romans, were approached by labor representatives in 1954; some, like Clark, were contacted in 1955; and some, like Abler, were not approached until early 1956. It is obvious from this record that the Union was not very successful; that, in most cases the employees did not respond; and that in every instance the carriers were more than reluctant to accept unionization.

5. The Clark situation is somewhat different from that of other eastern Nebraska carriers, so that it will later be considered separately.

6. Having no satisfactory success in the eastern Nebraska field, the Union apparently and very probably

started at the other end and began to work through the unionized carriers and put the pressure indirectly on the eastern Nebraska carriers. The motives and intermediate steps are not matters of importance. The fact is that, by early 1956, all or most of these Nebraska carriers began to experience difficulties in receiving and delivering freight from and to most of their normal and logical connections at Omaha. To a smaller degree, the same difficulties were experienced at other points, such as Sioux City, Lincoln, and Grand Island.

7. While some Omaha trunkline carriers did not freely admit that their interchange practices after May 1956, had been materially different from earlier practices, some others freely admitted they had not been able to interchange with eastern Nebraska carriers in the same free and open way they interchanged prior to May 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May 1956, a deterioration in interchange relationships and a rise in interchange difficulties.

8. The conclusions of Paragraph 7 are heavily confirmed by the testimony and exhibits of a number of the eastern Nebraska carriers. Example after example was recited with convincing sincerity, and surely no one could seriously contend that the firm declarations of these carriers were not well founded upon actual experience. The conclusions of Paragraph 7 must therefore be accepted as correct and conservative.

9. It should be stated that the attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe Trail, accepted almost all traffic offered. But even those carriers

did not maintain the same free and open interchange practices in effect before May 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it. There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not provide normally acceptable service for much or most of the traffic which these eastern Nebraska carriers would normally have handled.

10. The record shows beyond any reasonable doubt that, so far as those eastern carriers were involved, the free and open interchange practices long in effect at Omaha were materially disrupted and made inconvenient, difficult, and inefficient by May 1956. And there could be no reasonable doubt that, as a direct result, those Nebraska carriers suffered inconvenience, loss of business, and a deterioration of their service relations with their customers. A few examples of the effects will suffice. In 1955, about 20 percent of McKay's traffic was interstate, while now probably not over 10 percent is interstate. Abler's gross revenue fell about \$70,000 in 1956, and its interstate traffic fell from 60 percent of the total traffic to 40 percent. Incidentally, Abler used to have an appreciable amount of interstate traffic through Sioux City, Iowa, but has given up that gateway temporarily, assertedly because of Union pressure. Romans' February 1957 gross revenue was \$3,000 less than its February 1956 revenue. Lyon's total traffic used to include from 18 to 20 percent interstate, but now it is almost wholly intrastate.

11. Faced with that problem, some of the eastern Nebraska carriers got together and formed applicant corporation. No point would be made by reciting the preliminary or intermediate steps in that transaction. The principal theory of the corporation is that, as a carrier based at

Omaha, it could provide a reliable and dependable interchange service at Omaha and a trunkline service beyond.

12. As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation.

13. Applicant was originally organized as a Nebraska Corporation June 14, 1956, and was reorganized January 7, 1957. Its principal office is at Lincoln. Its authorized stock consists of 1,000 shares of common and 5,000 shares of preferred stock, all shares having a par value of \$100 each. Outstanding stock consists of one share of preferred and 375.5 shares of common stock. With a minor exception of a half share of common, all outstanding stock is held by eastern Nebraska carriers, no one of which holds over 51.5 shares. There are now 12 stockholders. There are three officers and those, with two other persons, form the present board of directors. All those officers and directors are eastern Nebraska carriers or officials of such carriers.

14. The corporation was formed for the purpose of operating as a motor common carrier of general commodities, with exceptions. Applicant first sought, and obtained, certain temporary authority. That authority was granted in No. MC-116067 (Sub-No. 1) by order of the Commission, division 1, entered December 4, 1956. A joint petition in opposition thereto was filed by four motor carriers, and that petition was denied by order of the Commission, entered February 25, 1957. In the meanwhile, compliance by applicant having been made, the Commission, by telegram of January 3, 1957, authorized applicant to operate

under that authority until June 30, 1957. That authority covers general commodities, with exceptions, over specified routes, between Omaha and Chicago, with interline service at Omaha and with no service at intermediate points, and between Omaha and St. Louis, with interline service at Omaha and with service at the intermediate point of Kansas City, Mo., except that the Kansas City authorization does not include shipments moving to or from St. Louis. While operations under that authority could have been commenced January 3, 1957, they were not commenced until shortly after March 1, 1957. The explanation of that delay is that, for reasons not disclosed, applicant's counsel advised against operations prior to that time. While there was no showing of traffic volume or number of trips, the record as a whole shows rather conclusively that operations under that authority have been at least rather substantial.

15. Under an application filed June 22, 1956, in No. MC-116067, applicant is seeking a certificate for general commodities, with exceptions, over a number of specified routes, principally between Denver, Colo., and Chicago, Ill., via Omaha, with service at all intermediate points. Hearing on that application was closed February 25, 1957. It should be noted that, as to points and commodities, the instant application would include everything in that application. The only material difference would be that this is for irregular route authority while that is for regular route authority.

16. Applicant has employed an able and experienced general manager, and it is more or less leaving it up to him to plan, institute, and maintain operations and services under this relatively broad application. No detailed plan was disclosed. Applicant asserts it would be a simple matter to provide the proposed service. As to possible backhaul traffic, it was admitted that this would be something of a problem. One statement was that, if service

were asked for a shipment from a distant outlying point to Omaha, an attempt would be made to solicit a load from Omaha to that outlying point or to some point near it. The appearances and indications are that some reliance would be placed on exempt commodities for backhaul. A statement on that subject was made to the effect that, if a load were moved from Omaha to Santa Fe, N. Mex., for example, it might be necessary to move the unloaded truck to a Rio Grande Valley point or to southern California for a return load. While no finding need be made on this subject, it seems to be a fair statement to say that an operation based on Omaha and covering so many States would, particularly as to less-than-truckload traffic, present a lot of difficult operational and service problems.

17. Although it states it might buy equipment if that were later deemed necessary, applicant has so far used only leased equipment. All appearances are that it would continue the use of leased equipment into the indefinite future. A number of eastern Nebraska carriers have declared their readiness and willingness to lease certain other equipment to applicant. Equipment is also available for leasing from other sources.

18. Applicant now has terminal facilities at Omaha and Chicago and it apparently has such facilities at Kansas City, Mo. Attempts are being made to obtain such facilities at St. Louis, Mo. Not much was said about future terminals.

19. Applicant's present employees consist of a general manager and an office employee at Omaha and a solicitor at Kansas City. Accounts are looked after on a part-time basis by a certified public accountant. There are no drivers carried on the rolls, because the lessors of equipment either drive their leased equipment or provide a driver with their equipment.

20. Applicant submitted a balance sheet as of March 31, 1957. That shows total assets of \$29,340.46 and current assets of \$26,213.06. Current liabilities were \$3,514.90. The capital stock account was \$37,550, and the earning deficit was \$11,724.44. That left a net worth of \$25,825.56. An operating statement for the period from June 14, 1956, through March 31, 1957, shows revenue of \$5,220.06 and expenses of \$16,944.50 and a deficit of \$11,724.44. Applicant explains that operations were not started until about March 1, 1957, and that expenses were sharply increased by expenditures for organizing the corporation and preparing it for operations. It contends that, with the authority sought, it could wipe out the deficit and get on a profitable basis. It also explains that additional funds could be raised by selling more stock.

21. A number of possible technical difficulties were pointed out at the hearing. One theory was that, since applicant's stockholders are owners or part owners of other motor carriers, section 5 of the act might be involved. Another theory advanced was that some stockholder carriers operate under registration of Nebraska certificates and that their stock holdings might have the effect of placing themselves in position where they would have to choose between their registration right and their right to hold stock in applicant corporation. Still another difficulty was argued from the fact that, if successful under both pending applications, applicant would have to the extent of duplication both regular and irregular route authority. Applicant declares that, if found necessary, section 5 applications would be filed. These asserted difficulties are technical in nature. They should not be considered as reasons for denying this application. If applicant is otherwise found fit and able and if it is found that public convenience and necessity require any part of this proposed operation, these technical matters should then

be studied and applicant should then be given an opportunity to overcome any obstacles that may arise from those matters.

22. The principal and most important evidence in support of this application comes from representatives of the 12 stockholders of applicant, which are eastern Nebraska carriers. From an earlier study of that evidence, along with all other evidence, it has already been concluded that, as a result of Union pressure on trunkline carriers, all those 12 carriers suffered some inconvenience and some damage from the action, inaction, or failure of those trunkline carriers in their interchange practices with those eastern Nebraska carriers.

23. When the evidence of those 12 carrier representatives is carefully and fairly examined, it must be said that not one of them complained of interchange conditions or of connecting line services in existence prior to the rise of Union pressure in early 1956. In other words, not one of them showed or even alleged that when conditions were normal they then had a need for a new or additional connecting line at Omaha. All their complaints are, in fact, bottomed on the rise of Union pressure. On the contrary, some of the leading figures in this enterprise admitted that, up to May 1956, everything in the way of interchange practices and connecting line services had been all right. For example, Lyon, the treasurer and a director of applicant, admitted his business was normal before February 8, 1956. Leonard Abler, a director, admitted his business had been normal up to May 1956. Romans, president and director of applicant and the principal carrier witness therefor, specifically admitted that his connecting line arrangements and practices had been satisfactory up to May 7, 1956. The only logical, reasonable, and fair conclusion from all that evidence is that, so far as those carriers are of concern, everything had been all right up to early 1956 and would

be all right again if the interchange practices and carrier services of trunkline carriers went back to their normal standards maintained before these Union difficulties arose.

24. As already noted, the Clark situation is somewhat different from that of other eastern Nebraska carriers. Clark started its business in 1938, under authority obtained from the Nebraska regulatory agency, and that authority was subsequently registered with this Commission. As a result of a proceeding before this Commission, a certificate, in lieu of registration, was issued to Clark on April 4, 1957. Clark's system of routes lies in northeastern Nebraska. Those routes extend from Lincoln, Omaha, and South Sioux City, Nebr., to such Nebraska points as Fremont, Columbus, Grand Island, Norfolk, Butte, and Ainsworth. It has terminals at Omaha and Norfolk. Like the other eastern Nebraska carriers, its difficulties arose from labor causes, but they arose earlier. After some labor negotiations, which need not be recited, four driver employees left the Clark organization at Omaha on September 14, 1955, and picketing of the Clark Omaha terminal immediately followed. As a result, interchange business with Omaha trunkline carriers fell to almost nothing. Clark's attorneys soon thereafter took that problem up with National Labor Relations Board. There were several resulting proceedings before that Board and before Federal Courts. Despite all that, these matters have never been completely settled, at least to the satisfaction of Clark. A contempt citation is still pending before the Court, and the Clark Omaha terminal is still being picketed. The interchange situation was rather acute until about July 30, 1956, when some improvement began to develop. Further improvement developed after November 1956. But the situation was never completely normal, not even up to the opening day of this hearing. There would be no point in detailing all the legal steps taken by Clark or on behalf of Clark, because those

controversies could not be fairly nor intelligently resolved here. The fact here is that the troubles of Clark arose from labor relations, and that the damage to Clark has been very severe. Its gross revenue fell from \$262,000 in 1954 to about \$217,000 in 1956, and its interstate traffic fell from 30 percent of its total traffic in 1954 to about four percent in 1956. But here again there is no showing nor even an allegation that the interchange practices or services of Omaha trunkline carriers were inadequate or even unsatisfactory prior to September 14, 1955. A logical, reasonable, and fair conclusion is that, if the labor difficulties complained of had never arisen, there would have been no complaint and no just basis for a complaint against Clark's connecting carriers.

25. In fairness to those eastern Nebraska carriers, it should be said that a few of them advanced the idea that, even if all labor problems were resolved and even if all truckline interchange practices went back to normal, there could be no assurance that labor problems might not arise again. While there is little history of past labor relations, the Abler witness declared his company had experienced similar difficulties three times before. In other words, the theory is that applicant could be used as a safeguard against the effects of possible labor difficulties in the future.

26. As further support for this application, applicant presented representatives of a number of possible users of the proposed service. Three of those possible users have been experiencing labor difficulties right at their own places of business. For that reason, their problems will be considered first.

27. Two related companies, using the same Omaha plant, will be referred to here as the Chardon Companies. Together, they manufacture a number of furniture items. Sales are made at numerous points in 29 States, most of

which are included in this application. Raw materials and supplies are received from one to several points each in 23 States, all of which are included in this application. The yearly volume averages 3 million pounds out and 3.5 million pounds in. Most of the outbound and much of the inbound traffic is controlled by the Chardon Companies. Truck service is used for 75 percent of the outbound and for 40 to 50 percent of the inbound traffic. It is admitted that service was all right until October 18, 1956, when a relatively small number of its 70 to 75 employees failed to show up and apparently went out on a strike. Shortly afterward, a picket line was formed around the plant. There were a few incidents of roughness, such as air being let out of workers' automobile tires and a flare being thrown through the window of the plant office. The police department could not determine whether the flare had been lighted. It should be noted that this labor difficulty was with the upholsters' union. As a result of that difficulty, the Chardon Companies encountered trouble in getting trucking service for its in and out freight. In the meanwhile, the labor trouble has disappeared, and normal service has been available since January 28, 1957. There is no showing nor contention that the service normally available is inadequate or would be for the future. The Chardon Companies have been using applicant's temporary service, along with the services of other carriers. In support of this application, they say that it would be a benefit to them to have many lines serving their plant and that, in case of more labor trouble, applicant's service would be very useful.

28. Ford Storage & Moving Company and Ford Brothers Van and Storage Company are family corporations, controlled by the same persons. Their problems will be considered together. They own two warehouses at Omaha and one warehouse at Council Bluffs, Iowa. Their

problems exist only at Omaha. They own some trucks and do local cartage work for the public, in and around Omaha. One principal function of these companies is to provide storage for all classes of merchandise, except such items as require cold storage. In connection with that important part of their business, they normally have a heavy movement of freight both in and out. From 1952 through 1956, the inbound volume ranged from the equivalent of 575 to 779 carloads. Indications are that the outbound volume is relatively large but substantially smaller than the inbound volume. Representative origins of inbound traffic are Chicago, Ill. Durham, N. C., Cincinnati, Ohio, Sioux Falls, S. Dak., and Beloit, Wis. Destinations of outbound traffic are principally in Iowa, Kansas, Missouri, Illinois, Wisconsin, Minnesota, South Dakota, Wyoming, and Colorado. On inbound traffic, rail service has always been heavily used, but there has been a growing tendency toward truck service. By early 1956, about 60 percent of the volume was coming in by truck. On outbound traffic, truck service is even more extensively used. Normally, the Ford Companies control outbound and the shippers control inbound traffic. These companies have never been unionized; they do not wish to be unionized; and they have never taken their problems up with National Labor Relations Board. Everything in transportation was all right here until early 1956, when the Teamsters Union began to take an active interest in their affairs. Service began to deteriorate. On February 9, 1956, one trucking company first accepted and then rejected a shipment from Ford, explaining that Union pressure was responsible. On May 24, 1956, pickets were stationed around the Ford warehouses. They were still there at the time of this hearing. After the pickets came, the service situation became desperate. Nearly all motor carriers were reluctant to service these warehouses and some apparently would not do busi-

ness with these companies. For about a month, during the early days of the picket line, even the train crews declined to serve the warehouses. In that state of emergency, the Ford Companies made arrangements to rely more extensively upon rail service, particularly into Omaha. That is not an ideal solution, and it is only a partial solution of the problem. In addition to the inconvenience and difficulties suffered by these companies, they have lost some of their volume of stored goods and have actually lost several accounts of long standing. All those transportation troubles came directly or indirectly from labor difficulties. The Ford Companies admit that their service situation prior to May 1956 was adequate and satisfactory. They support applicant with the hope and belief that applicant might solve their transportation problems. Even if the service of April 1956 were restored, they would still favor applicant's service, their theory of support being that service might be interrupted again in the future.

29. The Broyhill Company has a plant at Dakota City, Nebr., six miles south of Sioux City, Iowa, where it manufactures farm equipment. It sells at numerous points in 43 States, including most of those included in this application. Its gross sales ran between seven and eight hundred thousand in 1956, and greater sales are anticipated in 1957. Raw materials come from a number of points spread throughout 20 States. Rail service is used rather extensively on the bulkier inbound commodities but far less extensively on the outbound traffic. About 60 percent of the out traffic moves in truckload lots. About 80 percent of the outbound traffic is routed by Broyhill. The trouble here started on March 14, 1957, when employee members of a steel workers union went on strike and set up a picket line. Negotiations between Broyhill and the Union have been going on since sometime before the strike was called. As a result of the picket line, there has been no pickup

nor delivery service at the plant since the line appeared. Broyhill admits that it had no transportation problems prior to March 14, 1957, and that its service had been generally satisfactory. It nevertheless supports this application, upon the theory that there could be no guarantee that it would not have another strike.

30. Howard Huff has his place of business at Ord, Nebr., and sells farm machinery in Valley County, Nebr. His principal origin is Hopkins, Minn., but he also receives machines from Chicago, Rock Island, and Moline, Ill. Parts are received from those points, as well as from Kansas City, Mo. Business has been below normal for two years, but in normal times he receives from two to three full loads of machinery yearly and receives parts about twice monthly. He pays freight charges and ordinarily designates routing, although he admits that shippers sometimes do not follow his directions. He complains that, since May 1956, he has had some transportation difficulties. One complaint is that delays have occurred; another is that, contrary to his preference, rail service has been used from Omaha to Ord; and another is that, because of misrouting, excess charges have been applied. He prefers that all his traffic be moved from Omaha to Ord by Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

31. Richard Rowbal, of Ord, sells and erects Quonset buildings in nine Nebraska counties centered on Ord. His principal traffic comes from Detroit; and about 95 percent of it is normally handled by truck carriers. He pays freight charges and ordinarily designates routing beyond Omaha, and his preference is for delivery by Romans. He complains of delays, of the fact that excess charges have been applied in some instances, and of the fact that, contrary to his wishes, deliveries have been made by rail

carriers or by motor carriers other than Romans. It is plainly obvious that all these things complained of arose by reason of labor difficulties at Omaha. It is admitted that service had been satisfactory up to May 1956.

30. Wheeler Lumber, Bridge & Supply Company has a warehouse at Norfolk, Nebr. It receives raw materials from a number of points in the Midwest and East and ships manufactured products, such as snow fences and corn cribs, largely to Iowa, to some extent to Kansas, Wyoming, and South Dakota, and occasionally to Minnesota. With the exception of South Dakota, practically all outbound traffic goes by truck, and from 75 to 80 percent of the inbound traffic moves by truck. Routing is controlled by Wheeler. On inbound traffic, the practice apparently has been to let shippers select originating carriers but to instruct them to route care of Clark at Omaha. Clark and Abler have been the principal outbound carriers, but from five to six other Norfolk carriers have also been used to some extent. During most of 1955, routing preferences were followed and service was generally satisfactory. Apparently because of labor problems of eastern Nebraska carriers, particularly those of Clark, service has not been satisfactory since late 1955. Complaint was made of delays and of the fact that some shipments came by rail instead of by truck. It was admitted that at least one shipper declined to follow routings prescribed by Wheeler. It supports this application upon the theory that service by applicant in and out of Omaha would enable it to follow its preference in using the Clark service between Omaha and Norfolk.

31. Evidence in opposition to the application was submitted by ten rail carriers, three of which serve Omaha. That evidence tends to show that rail carriers offer and provide standard rail service from and to Omaha in connection with all classes of traffic moving from or to prin-

principal points throughout the territory of this application. Rail carriers are normally unionized throughout their various classes of employees.

32. About 29 motor common carriers submitted evidence in opposition to the application. All these are authorized to transport general commodities, with exceptions, and to operate principally or entirely over regular routes. At least 11 of those are authorized to serve Omaha. Those 11 include most of the principal motor common carriers at Omaha, such as Watson Bros. Transportation Co., Inc., Union Freightways, Navajo Freight Lines, Inc., The Santa Fe Trail Transportation Company, Prucka Transportation, Inc., and Independent Truckers, Inc. Most of the carriers serving Omaha have terminals there, and many of those are large carriers, operating large, or relatively large, fleets of equipment. Most of those carriers admit some difficulties in handling jointline freight with eastern Nebraska carriers, but all of them insist that, if conditions were normal, they could and would provide good interchange service and good highway service. All of them declare that, except for conditions not due to their initiative nor desire, they have been ready, able, and willing to provide service for all traffic offered by shippers or connecting carriers. For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers. It was explained that, where picket lines exist, there might still be difficulties in interchanging traffic in the usual and normal methods of interchange. All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline car-

riers will strive to restore to normal their carrier relationships and interchange practices at Omaha.

33. All the evidence submitted by carriers in opposition has been studied and weighed. The evidence for rail carriers shows that standard, normal rail service is available at Omaha and that rail carriers are ready and able to provide service for all traffic offered. While no serious attempts were made to show that rail service, as such, had been or would be inadequate, the trend of the testimony is to the effect that a sufficiency of motor service is and would be needed from and to Omaha. Actually, the problem here is not based on rail service but is based only on motor service. Rail service can therefore be dismissed from the problem.

34. The trunkline motor carriers, as a whole, have always been willing to provide service from and to Omaha, for traffic originating at or destined to Omaha, as well as for traffic received from or delivered to connecting lines at Omaha. They have also had the ability to provide a sufficiency of service of a quantity and quality, which, if freely and fully available, could have and would have met all the reasonable and well-founded transportation requirements for motor service asserted on this record. Were it not for the effects of union pressure upon these carriers, there would have been no material problem to complain of and there would be no problem here to consider. No matter how this problem is viewed, it has but one origin—labor pressure. If the labor effects were removed from this problem, no problem of any appreciable substance would remain. In that situation, the question is whether a grant of authority should be made to meet and overcome the effects of labor difficulties.

35. In these circumstances, the conclusion is that the application should be entirely denied. Most of the Omaha trunkline carriers have heavy investments in equipment and facilities and have large or relatively large employ-

ment rolls. Everybody knows that labor unions are not like Boy Scout organizations and that labor strikes or other labor difficulties can have seriously damaging or even disastrous effects upon a business and its employees. For example, one carrier in opposition has had a labor problem at its Minneapolis, Minn., terminal since April 21, 1952, and has not provided any direct service at that important terminal point since September 15, 1952. With those important factors influencing their judgment, and in view of the labor contracts they had signed, it was not illogical nor unbusinesslike to more or less go along with their union or at least not to get in trouble with it. As a matter of fact, many of the carriers were advised by a labor affairs consultant. There is no basis for finding that these carriers were negligent or that they were not diligent in meeting this problem, because they did just about what any reasonable and prudent business man would have done in the face of these union activities.

36.—Even though one of the stated objects of the national transportation policy is to encourage fair wages and equitable working conditions, the Commission has been given no power to settle labor problems or even to influence them.

37.—It is obvious that it would be unwise to attempt to use the certificate provisions of the act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union. In fact, that action could not be justified by anything in the act.

38.—The trunkline carriers have union contracts. The eastern Nebraska carriers are for the most part small or relatively small business men. Most of them are obviously opposed to unionization of their business. Their Commission has no authority nor means of solving that problem. If, as some eastern Nebraska carriers imply, the National Labor Relations Board does not offer a solution to that problem, then it obviously is a problem that only the Legis-

lative Branch of the Federal Government could solve. Certainly, this Commission is in no position to solve it.

39.—The principle recommended for application to this particular proceeding can be stated in this way: To the extent that the interchange and service defects and inadequacies complained of have been actually due to labor difficulties, and if, as to those difficulties, the carriers immediately affected have exercised such diligence and prudence as would normally be exercised by a business man faced with such difficulties, then, and to that extent, their services and interchange practices will not be considered inadequate for public convenience and necessity purposes.

40.—When that principle is applied here, it must be found that, so far as labor difficulties have affected interchange practices and services, the trunkline carriers are entitled to a protective finding.

41.—When that conclusion is made, there is nothing much left upon which a finding of public necessity could be based. Denial of the application must therefore be recommended.

42.—In view of that conclusion, there is no necessity of recommending a finding on the subjects of fitness and ability.

43.—Nothing said here is intended in any way to affect the application pending for authority over regular routes.

44.—The examiner finds that applicant herein has not proved that public convenience and necessity require the operation for which authority is sought and that consequently this application should be denied.

In view of the findings, the examiner recommends that the appended order be entered.

By Michael B. Driscoll, Examiner.

(Signature) MICHAEL B. DRISCOLL.

Recommended by Michael B. Driscoll,
Examiner.

(Signature) MICHAEL B. DRISCOLL.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on the
day of A. D. 1957.

No. MC-116067 (Sub-No. 2).

NEBRASKA SHORT LINE CARRIERS, INC. COMMON CARRIER
APPLICATION.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

(Seal)

HAROLD D. MCCOY,
Secretary.

Office Supreme Court, U.S.
FILED

SEP 27 1961

U.S. SUPREME COURT

IN RE

Supreme Court of the United States

October Term, 1961

Argued

27

THE UNITED STATES OF AMERICA, Appellant,

vs. THE NATIONAL ASSOCIATION OF INTERSTATE COM-
MERCE COMMISSIONERS AND NEBRASKA SHORT LINE

28

THE UNITED STATES OF AMERICA, Appellant, vs. THE NATIONAL ASSOCIATION OF INTERSTATE COM-
MERCE COMMISSIONERS and Shippers of
Interstate Commerce and Shippers of

THE UNITED STATES OF AMERICA, Appellant, vs. THE NATIONAL ASSOCIATION OF INTERSTATE COM-
MERCE COMMISSIONERS AND NEBRASKA SHORT LINE

THE UNITED STATES OF AMERICA, Appellant, vs. THE NATIONAL ASSOCIATION OF INTERSTATE COM-
MERCE COMMISSIONERS AND SHIPPERS OF INTERSTATE COMMERCE

Argued

James A. Nelson

U.S. Attorney

James W. Nelson

U.S. Attorney

U.S. Attorney

U.S. Attorney

Attorney for the Appellee,

National Short Line Car-

riers

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IN THE
Supreme Court of the United States

October Term, 1961

No. 336

BURLINGTON TRUCK LINES, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT LINE
CARRIERS, INC., *Appellees*.

No. 337

GENERAL DRIVERS AND HELPERS UNION LOCAL
554, Affiliated with The International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of
America, *Appellants*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT LINE
CARRIERS, INC., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised
Rules of this Court, Appellee Nebraska Short Line Car-
riers, Inc., moves that the judgment of the district court
be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered

on April 27, 1961, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325 dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission (Commission) awarding a motor carrier certificate of public convenience and necessity to Nebraska Short Line Carriers, Inc. (Short Line), to operate as a common carrier in the transportation of general commodities with certain exceptions over regular routes between Omaha, Nebraska, and Chicago, Illinois, and between Omaha, Nebraska, and St. Louis, Missouri, serving the intermediate point of Kansas City, Missouri, restricted in each instance to traffic originating at or destined to points in Nebraska. The Commission denied the other portions of the two applications for additional rights and restricted the present application to Nebraska traffic (J. S., Appendix A, p. 4).¹

The Commission in a single report dated June 1, 1959, reversed in part and affirmed in part the hearing examiner (Carriers J. S. p. 5; Appendix B; 79 M. C. C. 599), and authorized the before-mentioned certificate. As a result of the Commission's grant of authority, appellants Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc.,

(1) The first application sought authority to transport general commodities between (1) Denver, Colorado and Chicago, Illinois; (2) Omaha, Nebraska and Chicago, Illinois; (3) Minneapolis, Minnesota and Des Moines, Iowa; (4) Council Bluffs, Iowa and St. Louis, Missouri; and (5) St. Louis, Missouri and Lincoln, Nebraska; serving all intermediate points and Waterloo and Marshalltown, Iowa. The second application sought authority to transport general commodities between Omaha, Nebraska and Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc. (Carriers) and General Drivers and Helpers Union, Local 554, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) brought an action to the district court to set aside the order. Other protestants in the Commission proceedings did not participate in the district court action.

In granting Short Line's application the Commission (Carriers J. S. p. 89; 79 M. C. C. 599) held, "We desire to make it unmistakably clear that we are not attempting to adjudicate a labor controversy." The Commission went on to say, "The Act imposes upon Common Carriers by motor vehicle subject to our jurisdiction the duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and they are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates of public convenience and necessity and their published tariffs."

ARGUMENT

While the jurisdictional statements of the carriers and the Union discuss a number of questions relating to the Commission's Order the only issue is whether there was a rational basis for the Commission's decision. This Court has consistently held that orders of the Interstate Commerce Commission should not be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings and are supported by substantial evidence, even though the Court might reach a different conclusion on the facts presented. *I. C. C. v. Union Pacific*

4

R. R. Co., 222 U. S. 541, 547-548, 56 L. Ed. 308, 311, 32 S. Ct. 108; *Ill. Cent. v. I. C. C.*, 206 U. S. 441.

In that the evidence and law show a truly rational basis for the conclusions of the Commission, there is nothing additional to exhaust. The Appellants have set forth in their Jurisdictional Statements certain other minor allegations, none of which have any bearing on the present case. We will discuss each briefly:

1. The carriers and the union in their Jurisdictional Statements argue that the certificate in question was issued as a result of labor disputes. The certificate in question was issued pursuant to Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)) which provides in part that a certificate shall be issued if, "it is required by the present or future public convenience and necessity."

The Commission clearly did not issue the certificate in question to adjudicate a labor dispute. The Commission, in its report in this proceeding under review (79 M. C. C. 599, Carriers J. S. Appendix B, p. 89) stated, "We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy." In the same report (J. S. Appendix B, p. 91) the Commission stated its basis for granting said application to be,

"* * * Where as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy."

The evidence clearly showed the need for applicant's service, as summarized by the District Court.² (J. S. Appendix A, pgs. 19-20).

The Appellants also make allegations that interline service was, "available at all times" to Nebraska carriers operating between points in Nebraska and shippers and receivers of freight in Nebraska (Carriers J. S. p. 7). Such incorrectness has never before been set forth so tersely in a Jurisdictional Statement. This incorrect statement

(2) "Shippers from some fourteen towns and cities in Nebraska supported the application. Shipments of drugs requiring expeditious delivery under refrigeration were delayed; rush order shipments of automotive parts were delayed. The same is true of clothing and drug shipments, butter shipments of the value of \$18,000 to Chicago from a butter factory at Burwell, Nebraska, shipments of leather, newspapers, magazines, catalogues, advertising material, repair parts for farm machinery, truckload shipments of butter from Newman Grove, Nebraska, department store products, hardware store products and farm machinery parts from Sargent, Nebraska, hardware store supplies at Pierce, Nebraska, petroleum products, tires and accessories at Tilden, Nebraska, truck parts at Loup City, Nebraska, emergency shipments of auto parts at Neligh, Nebraska, tire shipments, seed, outboard motors, boats, marine hardware, plumbing fixtures, water softeners and related supplies, heating and air conditioning equipment, and dairy products from Kansas City, Chicago, Des Moines and St. Louis to Norfolk, Nebraska, raw materials for the manufacture of farm and industrial equipment, including corn cribs, grain bins, crop-drying machines and power steering devices from Kansas City, Denver, St. Louis, Minneapolis, Sterling and Chicago, Illinois and Hammond, Indiana, to Columbus, Nebraska, products for a chain store organization located at Fairbury, Nebraska, receiving a wide range of commodities from Minneapolis, Chicago, Kansas City and St. Louis, wallpaper, floor coverings and other merchandise from St. Louis, Chicago, Lyons and Joliet, Illinois, Kansas City, Minneapolis, St. Paul and Des Moines, Iowa to Fairbury, Nebraska, pump jacks, cylinders, water supply equipment, windmills and plumbing supplies from various scattered centers over the middlewestern and rocky mountain states to Fairbury, Nebraska, drugs, department store commodities for Lincoln, Nebraska, heating and air conditioning equipment, various manufactured products, including frames for upholstered furniture, cabinets and television set bases, products for storage in two large warehouses, including products from large tobacco manufacturers and packing houses to, from and into Omaha from various centers over the country."

probably goes to the Commission's finding that Burlington Truck Lines, and Santa Fe Trail Transportation Company, appeared to have accepted interline traffic more or less regularly after October, 1956, when offered (J. S. Appendix A, pgs. 34-35). The Commission did not make this finding as to items that were originated on Burlington's and Santa Fe's system and routed to be interlined with Nebraska Carriers, many of which are the only common carriers to small Nebraska communities, but which were never received by such Nebraska carriers from Burlington or Santa Fe.

The district court in considering the numerous sporadic refusals of Burlington Truck Lines and Santa Fe Trail Transportation Company, stated (J. S. Appendix A, pp. 23-24):

While some trunkline carriers did not freely admit that their interchange practice after May, 1956, had been materially different from earlier practices, some others freely admitted that they had not been able to interchange with Eastern Nebraska carriers in the same free and open way they interchanged prior to 1956. The preponderance of that evidence is to the effect that, in the case of most trunkline carriers, there was, after May, 1956, a deterioration in interchange relationships and a rise in interchange difficulties. These conclusions are heavily confirmed by the testimony and exhibits shown in this record, and no one can seriously contend that the evidence of the Nebraska carriers was not founded on actual experience. The attitudes and interchange practices of the trunkline carriers were not uniform. Some carriers were more liberal than others, and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe, accepted almost all traffic offered. But even these carriers did not maintain the same free and open in-

terchange practices in effect before May, 1956. * * *

There is also the fact that these few more liberal carriers only reached relatively limited points and therefore could not normally provide acceptable service for much or most of the traffic which these Eastern Nebraska carriers would normally have handled."

The district court (J. S. Appendix A, p. 18) further found,

"* * * Specific instances were shown where D.M.T., Haeckel, Red Ball, Burlington and Buckingham Transportation did accept shipments in October, 1956. Since then tenders of interstate freight have been made to certain carriers and Clark found that the traffic was accepted in some instances and refused at other times. Seeking motor carriers to accept freight has resulted in delays, sometimes taking at least two days to dispose of shipments."

The Commission further found (79 M. C. C. 599, 603; Unions J. S. Appendix B, p. 76),

"* * * Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers."

The facts in this matter clearly illustrate that the com-

mission did not attempt to adjudicate a labor dispute. As we will discuss later a labor dispute was nonexistent. The Commission in relation to its obligations under the provisions of the Interstate Commerce Act were concerned with the fact that the existing carriers were shown to have so conducted their operations as to result in serious inadequacies in the service to the shipping public of Nebraska. The Commission in furtherance of that duty, granted part of the application, restricted to Nebraska service, wherein the Commission is empowered and charged with the duty of procuring such additional facilities by the grant of motor carrier authority as was necessary to carry out the purposes of the National Transportation Policy.

2. The Appellants in their Jurisdictional Statement argue that because they allege this matter involved a labor dispute that jurisdiction lies with the National Labor Relations Board and not the Interstate Commerce Commission.

The Appellants would seek to have the shipping public of Nebraska take their transportation problems to the National Labor Relations Board. Clark, the only witness who had a labor dispute did exactly that but to no avail. The National Labor Relations Board order obtained by Clark (Union J. S. Appendix C, p. 147) shows that the Teamsters are directed to cease and desist from certain secondary boycott activities against Clark "or any other common carrier by motor vehicle in the area" over which Teamsters Local 554 has jurisdiction. The protection afforded Clark was thereby extended to all other motor carriers involved in the instant proceeding. But in spite of this, the shipping public of Nebraska were unable to get service because the existing interstate carriers refused to or at least did not give service. This Court held in *Local*

1976, *United Brotherhood of Carpenters and Joiners of America, A.F.L. v. N.L.R.B.*, 357 U. S. 93,

"Since the Genuine Parts decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.* (12 Federal Carriers Cases P. 34, 179), 73 M.C.C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

"It is significant to note the limitations that the Commission was careful to draw about its decision in the Galveston case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it."

This Court in the same case held that common factors may emerge in the adjudication of these questions, but that the Interstate Commerce Commission, not the National Labor Relations Board is the one concerned with whether the carrier has performed its obligations to the shipper.

The carrier defendants in (*Carriers J. S.*, Appendix E) attempt to bring in a matter outside the record. The appellants (*Carriers J. S.*, p. 12) state:

"Even after enactment of the Landrum Griffin Act which deals with 'hot cargo' clauses, a union under-

took to obtain a modified 'hot cargo' clause. In spite of the fact that Short Line received a certificate to serve a so-called non-union segment of the shipping public, its service has also apparently been affected by recent Teamster actions. (Appendix D, pages 190-191). Whether the effect upon Short Line's service will be temporary or permanent will depend upon future action by the National Labor Relations Board and the Courts."

Short Line knew nothing about this proceeding as set forth in Appendix E, except that a picket was present but Short Line at all times continued to serve the shipping public. Short Line has never been a party to any labor proceeding and has had no labor difficulty. Short Line has in the past and will in the future, if allowed by this Court, continue to serve the public in accordance with its statutory duty even should a Union request it to voluntarily not perform that duty as was done with the Appellant Carriers by Appellant Union. The courts have consistently held that a carrier is not relieved of its duty to serve the shipping public if a picket or a strike is present or if asked not to do so by a Union. See *Pacific Gamble Robinson Co. v. Minneapolis and St. Louis Railway Co.*, D. C., 105 F. Supp. 794, 215 F. 2d 126; *Erie Railroad Co. v. Local 1286, International Longshoremen's Association*, 117 F. Supp. 157; *Montgomery Ward and Co. v. Northern Pacific Terminal Co. of Oregon*, 128 F. Supp. 475, 128 F. Supp. 520; *Consolidated Freight Lines, Inc. v. Department of Public Service*, 200 Wash. 659, 94 P. 2d 484; *Beck and Gregg Hardware Co. v. Cook*, 210 Ga. 608, 82 S. E. 2d 4; *Burlington Transportation Co., et al v. Hathaway, et al* 234 Ia. 135, 12 N. W. 2d 167; *Planter's Nut and Chocolate Co. v. American Transfer Co.*, 31 M. C. C. 719; *Merchandise Warehouse Co. v. A. B. C. Freight Forwarding Corp.*, 165 F. Supp. 67.

As set forth previously, Clark was the only one with a

picket at its place of business. The Appellant Carriers refused to serve the others who had no picket or labor difficulties. The Appellants' contention that this matter was based primarily on facts and circumstances within the exclusive jurisdiction of the National Labor Relations Board and outside the jurisdiction of the Interstate Commerce Commission is without merit.

3. The next question presented by Appellants is whether temporary interruptions of service, may be made the basis for a grant of authority. The Appellants begin with the unfounded principle that the facts show temporary interruptions of service. As seen from Clark's testimony (J. S. Appendix A, pp. 105-107) the service difficulties started in September of 1955 and were still present on April 17, 1957, the date of the last day of hearing before the Commission Examiner. Certainly this was not a temporary interruption of service as argued by Appellants. Certainly by this argument the Appellants do make the judicial admission that there was an interruption of service in the years 1956, 1957, and 1958.

The Commission pursuant to Section 207 of the Interstate Commerce Act is directed in determining applications for motor carrier certificates of public convenience and necessity to consider both the present and future public convenience and necessity.

To quote the District Court (J. S. Appendix A, p. 45): "Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service."

The Commission in its report (Carriers J. S. Appendix C, p. 92), stated:

“* * * whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term ‘present or future public convenience and necessity’ in section 207 of the act, under which the applications were filed.”

The Commission merely found the service of an additional carrier was required in order for the public to have adequate service where existing carriers in the field could not or did not desire to perform the same.

4. The Appellants argue that the proper remedy of the Nebraska shippers was to file a complaint with the Interstate Commerce Commission against the carriers in the field rather than to ask for additional service. As can be seen the Appellant carriers already had a duty to render “continuous and adequate service to the public.” The only thing that the Commission could have done was to suspend or revoke their certificate which would not have served the shipping public and would have been an extreme hardship on Appellant carriers. The Commission in *Davidson Transfer & Storage Co., et al v. U. S. et al*, 42 F. Supp. 215, at page 219 stated:

“In the case at bar, the Commission has found that the services of an additional carrier are required over the routes designated in order that the public may have adequate service. It made no finding that any of the protestants were derelict in their duties, but even if the Commission had made such a finding, we would not conclude that the Commission was thereby prohibited from authorizing an additional, and, if need be, a competing carrier to operate in the field.

We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service and there is nothing in any of the sections cited or in their legislative history that would require a contrary conclusion."

The appellants take inconsistent positions when they argue that this matter was exclusively within the jurisdiction of the NLRB and later argue this matter should have been handled by a complaint filed with the Interstate Commerce Commission. Neither action would have provided the service needed by the Nebraska shipping public.

In summary the only issue present is whether there is a rational basis for the Commission's finding. It is not whether this Court may have reached different findings on the record. Under the evidence in this case we submit that where the shipping public of Nebraska was desperate for service as shown by witnesses who numbered in excess of 63 that the appellant carriers who refused the Nebraska traffic will not be hurt in that they do not desire to handle the traffic or they would have done so before the filing of this application. If they are not now enjoying the traffic, it is obvious that they can not be affected by the granting of the instant application. It is quite obvious that the applicant with the operating restrictions imposed upon its certificate could never be a serious competitor of the Appellant carriers, but the certificate in question does permit and does allow the shipping public of Nebraska the service that they so desperately need.

CONCLUSION

The appeal presents no substantial question and the

judgment of the District Court is correct and should, without further briefs or argument, be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 336

BURLINGTON TRUCK LINES, INC., ET AL., APPELLANTS

v.

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION**

No. 337

**GENERAL DRIVERS AND HELPERS, LOCAL 554, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, APPELLANT**

v.

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ILLINOIS**

**MOTION OF THE INTERSTATE COMMERCE COMMISSION TO
AFFIRM**

Pursuant to Rule 16, paragraph 1(c), of the Re-
vised Rules of this Court, appellee Interstate Com-
merce Commission moves that the judgment of the
district court be affirmed.

STATEMENT

The present cases are on direct appeal from a final judgment, entered on April 27, 1961, by a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission, dated June 1, 1959. This order (J.S.A. 95)¹ granted a certificate of public convenience and necessity to Nebraska Short Line Carriers, Inc., authorizing it to perform interstate motor carrier operations as a common carrier of general commodities (1) between Omaha and Chicago, serving no intermediate points, and (2) between Omaha and St. Louis, serving the intermediate point of Kansas City, Missouri, but restricted, in each instance, to traffic originating at or destined to points in Nebraska (see J.S.A. 92-93).

The undisputed evidence of record, as set out in the Commission's Report (J.S.A. 71-95; 79 M.C.C. 599-615) is as follows:

1. The stock of the applicant corporation is held in varying amounts by several motor carriers which operate between certain points in Nebraska. Some of these stockholder-carriers hold certificates of public convenience issued by the Interstate Commerce Commis-

¹ For convenience, we refer to the decisions of the district court and Commission as printed in the Appendix to the Jurisdictional Statement filed in No. 336 by the Burlington Truck Lines, Inc., *et al.*, which we cite as "J.S.A." In addition, "J.S." refers to the Jurisdictional Statement in No. 336.

sion, and others hold motor carrier authority from the Nebraska State Railway Commission. All are carriers of general freight operating over regular routes in eastern and central Nebraska converging upon Omaha, Lincoln, and Grand Island, Nebraska, at which they interchange traffic with other motor carriers for movement to and from points beyond Nebraska (J.S.A. 72-74).

For several years, the stockholder-carriers have resisted all attempts on the part of the Teamsters' Union to organize their employees. Despite the general disinterest of the employees in seeking union membership, the union determined that organizational efforts should be concentrated upon the management of the stockholder-carriers in order to attempt to get the employees into the union. Failing in the attempt, the union thereupon decided to enforce their demands by bringing economic pressure to bear on the stockholder-carriers, declaring certain of the stockholder-carriers "unfair" and instituting a secondary boycott against their traffic on the part of the larger unionized carriers, some of whom opposed the application before the Commission and are appellants in this action. The stockholder-carriers are dependent upon the unionized carriers for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to certain so-called protection of rights or "hot cargo" clauses contained in

the contracts of the unionized carriers.' (J.S.A. 74-75.)

None of the stockholder-carriers, except Clark Brothers Transfer, had ever had any dispute with its employees, and no picket line had ever been established with respect to any stockholder-carrier except at Clark Brothers' Omaha terminal (J.S.A. 75).

2. Beginning in the early part of May 1956, certain of the stockholder-carriers began to experience difficulty in effecting normal interchange arrangements with the larger unionized carriers with whom they had done business. The difficulty was experienced primarily at Omaha, but also to some extent at Lincoln and Grand Island, and consisted of the refusal on the part of many of the larger unionized carriers promptly to accept outbound interline traffic tendered to them by the stockholder-carriers, and the refusal to turn over to the stockholder-carriers inbound traffic routed over their lines or inbound traffic which normally would have been turned over to them at Omaha and the other points named for ultimate delivery to interior points in Nebraska served by them (J.S.A. 75-76).

² "Hot cargo" clauses provide generally that it shall not be cause for discharge if any employee refuses to go through a picket line of a union or refuses to handle "unfair" goods, and that the union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with a union and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walkouts, or lockouts exist.

The application of the stockholder-carriers was supported before the Commission by a large number of persons operating businesses at fourteen cities and towns in Nebraska, who, in many instances, are dependent upon regularly scheduled motor carrier service to meet their normal everyday transportation requirements. As a result of the breakdown of interchange arrangements at Omaha, the shippers at these interior points in Nebraska experienced delays in the movement of their outbound shipments to the named destinations, and also delays, inconveniences and unforeseen expense in the movement of inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unrouted shipments in the most direct manner (J.S.A. 79-80). In addition, certain shippers at Omaha also supported the application. The unionized carriers had refused to cross picket lines at the places of business of these shippers, which resulted in the almost complete withdrawal of motor carrier service at the shippers' establishments (J.S.A. 80).

As the Commission stated in summarizing the situation with respect to the failure of the stockholder-carriers to effect adequate interchange arrangements with the unionized carriers (J.S.A. 76-77):

At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which

are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. * * *

3. The Commission, in concluding that the present and future public convenience and necessity required operation by the applicant as a motor common carrier (J.S.A. 92), stated that "[w]here, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary

to carry out the purposes of the national transportation policy" (J.S.A. 91).

The Commission distinguished the situation here from one where it had refused to authorize new service, the need for which had been based upon service stoppages which had terminated over three years earlier pursuant to a court injunction (see *Galveston Truck Line Corp. Extension Oklahoma*, 79 M.C.C. 619, 622). The Commission pointed out that in the present case "such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing" (J.S.A. 91-92). On March 10, 1960, the Commission denied the petitions for reconsideration. Upon review the district court, with District Judge Mercer dissenting, upheld the Commission's report and order and dismissed the complaint (J.S.A. 1-70).

ARGUMENT

The appeals in the present cases raise legal issues which are of no general application and which are unlikely to recur in their particular factual setting because of subsequent changes in the law. Under the circumstances, the district court's affirmance of the Commission's factual determinations clearly do not warrant further review by this Court.

1. Both appellants argue at length in their jurisdictional statements that the Commission has no authority to certificate new carriers to meet what they characterize as merely "temporary" service deficiencies, i.e., deficiencies which the existing carriers have corrected by the time of the eventual Commis-

sion decision, and that therefore the Commission's only remedies against future violations by certificated carriers of their statutory responsibilities lie in action under either Section 204(c) or 212 of the Act, 49 U.S.C. 304, 312.

There is nothing in the Interstate Commerce Act or in its legislative history to support appellants' contentions. The Commission's remedial armory for insuring that carriers adhere to their statutory responsibilities is not so limited as appellants would have this Court believe. Where the circumstances indicate that a particular service deficiency, though temporarily corrected, has a reasonable likelihood of recurrence, the Commission, within its broad certification authority, may authorize the establishment of new service to insure against the future potentialities of renewed service stoppages. See *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241; *Interstate Commerce Commission v. Parker Motor Freight*, 326 U.S. 60, 69-70; *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 219 (E.D. Pa.), affirmed, 317 U.S. 587; cf., *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86. Were this not the case, the carriers would be largely free to ignore their statutory obligations whenever they calculated that their private interest in so acting would outweigh any risk of the authorization of a new competitive service.

Moreover, this general rule is not limited by any requirement that all of the carriers affected by the grant of the new service should be equally responsible for the prior service deficiencies. The Commission

must of course give appropriate consideration to this factor as well as to the impact of the new grant upon the ability of the existing carriers—both innocent and guilty—to perform their certificated services. But where, as here (J.S. 90), the Commission has fully considered these facts, the Commission clearly cannot be precluded from making an award it deems necessary in order “that future shipping needs be assured rather than left uncertain” (*United States v. Detroit Navigation Co.*, *supra*, 326 U.S. at 241).

2. The fact that the particular cause for service stoppage in the present case was the unwillingness of some of the carriers to risk labor difficulties if they continued to provide adequate service to the non-union Nebraska carriers neither places the service inadequacy beyond the reach of the Commission's licensing power nor requires invocation of the primary jurisdiction of the National Labor Relations Act. The Commission has no concern with the question of whether its certificated carriers, the carriers with which they connect or the shippers they serve are or are not unionized, and it cannot license or refuse to license a carrier in the light of its own ideas as to proper labor relations in the transportation industry (see J.S.A. 89). Thus, the Commission could not reject an applicant merely because it had entered into a “hot cargo” clause with its employees or had refused to bargain with them.

Just as the Commission is not appointed as the arbiter of labor relations within the transportation industry, the National Labor Relations Board similarly is not given authority to determine transporta-

tion policy under the Interstate Commerce Act. As this Court stated in *Carpenters Union v. National Labor Relations Board*, 357 U.S. 93, 109-110, in rejecting an effort by the Board to determine the validity of "hot cargo" clauses involving transportation unions on the basis of their alleged impropriety under the Interstate Commerce Act:

It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. * * *

Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. * * *

In so holding, this Court referred to the Commission's decision in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, where it was expressly held (at p. 626) that, regardless of whether a carrier may enter into "hot cargo" contracts, it cannot "thereby relieve itself of [its statutory] obligations" and that it still is "obligated to accept and transport all freight offered to [it] in accordance with the provisions of their published tariffs." See *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry. Co.*, 105 F. Supp. 794, 802 (Minn.), affirmed, 215 F. 2d 126 (C.A. 8); *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, 498-499, 128 F. Supp. 520 (Ore.); *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719.

3. The relevance of the National Labor Relations Act to this particular case lies not in the primary jurisdiction of the Board-over its subject matter but in the fact that a 1959 amendment to the National Labor Relations Act, which became effective approximately six months after the decision in this case, appears to have obviated the likelihood of a recurrence elsewhere of the particular problem which led to the grant of the certificate. Under Section 8(e) of the Act, 29 U.S.C. (Supp. II) 158(e), as amended, it is now an unfair labor practice for a union and an employer "to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing with any of the products of any other employer, or to cease doing business with any other person." Contracts of this nature heretofore entered into are declared "unenforceable and void," and the National Labor Relations Board in a recent decision, *Mary Feifer, d/b/a American Feed Company, et al.*, 133 NLRB No. 23, decided September 20, 1961, has expressly found that the very "act of entering into, signing, executing, or making" a hot cargo contract is sufficient to establish a violation of the amended section.³

³ As the Commission noted (J.S.A. 75), no such certainty as to the validity or invalidity of hot cargo contract clauses existed as of the time of the Commission decision here. See *Carpenters Union v. National Labor Relations Board*, *supra*, 357 U.S. at 101-104.

4. The question therefore presented in the present case is whether there is sufficient evidentiary basis in the record for the Commission's conclusion that, despite the termination of the service interruptions, "the present and future public convenience and necessity require operation by applicant * * *" (J.S.A. 92). The Commission believed that, where the service delays and stoppages had continued up to and including the time of the hearing, there could be no assurance that further delays would not take place in the future. It pointed out that the persons affected by the carriers' general acquiescence in the refusal of their employees to interchange traffic with the non-union Nebraska carriers were not limited to those carriers alone but included the many shippers in Nebraska who were unable to secure adequate service. Moreover, although it may be argued that future service difficulties could largely be obviated by an order directing the carriers to perform any interchange services regardless of any hot cargo clause to which they were signatory, the Commission clearly did not act irrationally in determining, in the light of the then current uncertain status of the labor law, that the promotion of an adequate transportation system meeting the needs of the commerce of the United States, within the meaning of the national transportation policy, 49 U.S.C. preceding 1, would best be insured by the establishment of a new carrier able to perform the needed services.

CONCLUSION

The district court opinion was correct and the appeal presents no issues of general importance warranting further review by this Court. The judgment below accordingly should be affirmed.

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NOVEMBER 1961.

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No. 200

27

BURLINGTON TRUCK LINES, INC., ET AL.,

Appellants,

vs.

**UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND NEBRASKA SHORT
LINE CARRIERS, INC.,**

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

**APPELLANTS' REPLY TO APPELLEES' MOTIONS
TO AFFIRM.**

Certificate of Service Appended at Page 10.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961.

No. 336.

BURLINGTON TRUCK LINES, INC., ET AL.,

Appellants;

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND NEBRASKA SHORT
LINE CARRIERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

**APPELLANTS' REPLY TO APPELLEES' MOTIONS
TO AFFIRM**

Pursuant to Rule 16(3), of the Revised Rules of this Court, appellants file this their Reply to the Motions to Affirm filed herein by appellees.

ARGUMENT.

Appellees (hereinafter referred to as "Commission" and "Short Line"), in separate motions to affirm, rely upon conflicting interpretations of the Commission's decision in arguing that the questions presented in Appellants' Jurisdictional Statement are not substantial. These conflicting assertions by appellees serve only to demonstrate that there is no rational basis for the Commission's deci-

sion. The incredibly divergent interpretations set forth in appellees' Motions illustrate the uncertain foundations upon which the decision rests and the future confusion it will create if it is permitted to stand as precedent to be relied upon by future applicants seeking to obtain operating authority from the Commission.

In granting authority to Short Line to transport general commodities between three of the largest cities in the Midwest, on the one hand, and Omaha, on the other, the Commission has created a giant new common carrier, at least in terms of operating authority, which will presumably offer substantial, permanent competition to presently certificated carriers. This action was taken on the basis of a showing not of inadequacy in available service, but rather on the basis of a showing of temporary disruptions in the interchanging of freight between union and non-union carriers resulting solely from labor difficulties brought about by actions of the International Brotherhood of Teamsters (hereinafter referred to as "Union") over which none of the carriers had control.

The Commission's summary of facts in its motion concerning available service during the period in question and that of Short Line are almost diametrically opposed. Referring to the willingness of Burlington and Santa Fe to interline freight with its stockholders, Short Line twists the Commission's findings, stating:

"The Commission did not make this finding [that Burlington and Santa Fe provided continuous service] as to items that were originated on Burlington's and Santa Fe's system and routed to be interlined with Nebraska Carriers, many of which are the only common carriers to small Nebraska communities, but which were never received by such Nebraska carriers from Burlington or Santa Fe." (Short Line Motion, p. 6.)

The Motion of the Commission contains a part of the reply to this assertion by Short Line (Commission Motion, pp. 5-6):

"* * * Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company which are rail subsidiaries appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them."

The rest of the answer is contained in Examiner Sutherland's finding regarding available service subsequently adopted by the Commission (Exhibit B. J. S. p. 155):

"[T]hey [presently certificated carriers] are transporting the traffic over their respective portions of the routes involved and *the shipments are moving through to destinations.*" (Emphasis ours.)¹

Short Line asserts that the Commission was not attempting to adjudicate a labor dispute by granting it a certificate. Yet Short Line does not dispute the fact that the entire problem arose because of an organizational campaign by the Union. The Commission's motion admits the labor origins of the problem; however, it asserts that the questions raised by the instant appeal are moot for the reason that Congress has amended the Labor Management Relations Act.² Certainly, therefore, Congress believed the situation

1. Burlington and Santa Fe serve between all of the points embraced in the certificate granted to Short Line. Examiner Sutherland's reference to "portions of the routes involved" concerns itself with the entire authority sought which was broader than the subsequent grant.

2. It remains to be seen whether the 1959 amendments to the Labor Management Relations Act have finally solved the problems created by the refusal of employees to handle so called "hot goods" or to cross picket lines. The National Labor Relations Board has indicated that it will consider the problem on case by case basis, apparently on the assumption that all forms of such union action have not been outlawed. *Teamsters Local 546*, 133 NLRB No. 127 (1961). See also *American Feed Company*, 129 NLRB No. 321 and *Amalgamated Lithographers of America*, 130 NLRB No. 102; *NLRB v. Local 710*, Jurisdictional Statement Appendix E, p. 188.

to be a labor problem and not a transportation problem, otherwise it would have amended the Interstate Commerce Act and not the Labor Management Relations Act. In this connection, it is necessary to consider the cause of the problem—the labor dispute—and not merely its effects—the disruption in the interchanging of freight.

It is admitted by the Commission that the disruption in interchange practices of some of the carriers was temporary. The Commission asserts, therefore, that they are unlikely to recur. However, Short Line takes an exactly opposite position asserting that the disruptions were of a permanent nature and likely to persist unless the Commission took remedial action.

By arguing that the questions raised by this appeal are unlikely to recur, the Commission ignores the fact that there is presently pending before it an application for operating authority in which one of the grounds relied upon by the applicant is that the existing carriers failed to discharge their obligations under the Interstate Commerce Act for a short period of time due to a dispute between those carriers and the union representing their employees.³ If the Commission's decision in the instant matter stands, it is certainly precedent upon which applicant in that case may rely. Similar questions will be raised again and again so long as unions possess the power to cause cessations or disruptions in service by taking action to obtain certain objectives believed to be beneficial for their members.

Neither the Commission nor Short Line makes any reference to the Commission's finding that by April 3, 1957, Watson Bros., Prucka Transportation and Independent

3. *Edwin Carl Johnson Common Carrier Application*, Docket No. MC 117130. The strike referred to in the *Johnson* case has no relation to hot cargo problem and therefore amendment to Labor Act does not affect that application.

Truckers were undertaking to maintain normal interline operations. Examiner Driscoll found

"All fair indications are that, under the leadership of these large and progressive carriers, ~~other Omaha trunkline carriers will~~ strive to restore to normal their carrier relationships and interchange practices at Omaha." (Jurisdictional Statement, Appendix pp. 183-184.)

This action came less than one year after the interchange difficulties were first noted (Commission motion p. 4). Thus, the Commission's findings clearly establish that Burlington and Santa Fe provided service throughout the entire involved period between all of the points subsequently embraced in the Short Line certificate, and that three other carriers were able to work out their difficulties with the Union within one year after the disruptive activities of the Union began. There is no finding, and indeed there is no basis for one, that at any time during this period the available service between the points Short Line was subsequently certificated to serve was inadequate. Taken in its best posture for appellees the most that can be said is that interline difficulties were encountered by some of Short Line's stockholders. Shipments moved "through to destinations" during the entire period.

Although Short Line disputes appellant's reference to the temporary nature of the difficulties, the Commission does not (Commission motion pp. 7-8). The problem, admittedly caused by an organizational campaign conducted by the Union, was by its very nature temporary and the Commission's findings and motion do not quarrel with this conclusion. Furthermore, it is unfair to consider all of the carriers as one as Short Line does and then conclude that service was "inadequate" for three years. The findings made by the Examiners which were adopted by the Commission do not support this conclusion and the Com-

mission in support of its own decision does not argue that such conclusions are warranted from the findings upon which the decision is based.

The questions raised by appellants are substantial and remain unanswered. There was no effort by the Commission in its motion to disguise the fact that the Commission by its decision in the instant matter attempts to adjudicate a labor dispute in accordance with the Commission's view of what the labor policies of carriers ought to be and without reference to or jurisdiction over the Union. Short Line fails in its motion to divert attention from the labor aspects of this decision. Its search for a rational basis for the decision makes reference only to the conclusions of the Commission and not to the facts found by the Commission upon which the Commission relied in order to reach those conclusions. Its assertion that NLRB action would not have resulted in removing the disruptions in the service of some carriers cannot stand the light of day. Had the NLRB ordered the Union to cease its efforts to enforce the hot cargo clauses it had negotiated in its contracts with organized carriers, there can be no doubt that all of the disruptions would have disappeared. There is no assertion or finding that the carriers had any interest in the Union's organizational efforts or any reason for not interchanging freight at Omaha. Therefore, definitive action by the NLRB pursuant to its authority to adjudicate the legality of labor contracts would have solved the problem. Moreover, the Board has jurisdiction over both the Union and the carriers. The Commission's action left the Union free to continue its efforts to enforce the hot cargo contracts until the Board and this Court held them to be unenforceable, *Local 1976 v. NLRB*, 357 U. S. 93 (1958).

There is no assertion or finding that the disruptions in interchanging resulted from actions of the existing carriers. Moreover, the Commission does not indicate that

in its opinion additional competition is necessary in the area which Short Line has been authorized to serve. Therefore, *Davidson Transfer & Storage Co. et al. v. U. S.*, 42 F. Supp. 215, cited by Short Line is not applicable. In the instant matter, the Union which is not subject to the Commission's jurisdiction caused disruptions in the interchanging of freight between some carriers. In an effort to adjudicate the resulting labor dispute, the Commission granted a certificate to Short Line thereby penalizing all of the existing carriers regardless of how any particular carrier reacted to the Union's pressure or whether adequate service to the shipping public was maintained at all times.⁴ This action by the Commission, if allowed to stand, will permit the Commission in the future to assert jurisdiction in every situation where a carrier, or carriers are involved in a labor dispute. There is no justification for this extension of the Commission's jurisdiction and it should not be permitted.

As set forth in appellants' Jurisdictional Statement, the Commission has based a grant of authority upon findings which merely establish that the Union caused some disruptions in the interchanging of freight between some carriers during an organizational campaign. There is no finding that the motor carrier service was not adequate to meet the

4. In a recent ruling, the United States District Court for the Northern District of Oklahoma stated:

"Under the National Transportation Policy as declared by Congress [54 Stat. 899 (1940), 49 U. S. C. preceding § 1 (1958)] and as construed by the Supreme Court [*Schaffer Transp. Co. v. United States*, 355 U. S. 83, 90; *I. C. C. v. Park*, 326 U. S. 60, 70] the issuance of a certificate of public convenience and necessity requires determination by the Commission of the prejudice, if any, which will result therefrom to existing properly authorized carriers. Further, the adequacy of existing service is a proper item for consideration by the Commission in such a proceeding." *Parkhill Truck Co. v. U. S. et al.*, 14 Federal Carriers Cases paragraph 81, 406 (D. C. Okla. October 18, 1961).

needs of the shipping public at any time. The granting of authority in these circumstances is contrary to the standards set forth in the Interstate Commerce Act.

Use of the certification provisions of the Act to create substantial additional motor carrier competition in an area without a finding that the new service is needed and will not seriously jeopardize existing carriers clearly violates the National Transportation Policy expressed by Congress. The action of the Commission in the instant case penalized all carriers without regard to whether any particular carrier failed to fulfill its obligations under the Act. Moreover, the Union, whose attempted enforcement of the hot cargo clauses caused the disruptions is unaffected by the Commission's decision. Obviously, the complaint provisions of the Act (49 U. S. C. 304(c) and 312) are far better suited for dealing with specific breaches of duty by particular carriers. Use of these provisions of the Act would permit the Commission to take suitable steps against a carrier which failed to meet its obligations without at the same time penalizing every carrier in the area. The many cases relied upon by the Commission (Motion p. 10) and Short Line (Motion p. 10) illustrate the use of complaints filed with administrative agencies and courts by injured parties against particular carriers alleged to have breached their duty. Neither the Commission nor Short Line cites an instance where all carriers including the innocent were penalized by the creation of additional competition without regard to whether any permanent need for such competition existed. Injured parties could also have sought redress in the instant matter from the NLRB which has jurisdiction over both the Union and the carriers.

CONCLUSION.

The questions presented by this appeal are substantial and of great public importance. They are likely to recur many times as applicants for operating authority from the Commission attempt to rely on disruptions in interlining or service by motor carriers caused by unions to justify their applications. It is urged, therefore, that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, David Axelrod, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of December, 1961, I served copies of the foregoing Appellants' Reply to Appellees' Motions to Affirm on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to its respective attorneys of record, as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

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AUG. 23 1967

JOHN F. ... DE-K

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 27

BURLINGTON TRUCK LINES, INC., ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT
LINE CARRIERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

Certificate of Service Appended at Page 29.

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OCTOBER TERM, 1962.

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BURLINGTON TRUCK LINES, INC., ET AL.,
Appellants,

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UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT
LINE CARRIERS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31 (1961). A copy of the opinion appears in the printed record (R. 209). The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599 and is in the printed record (R. 99).

JURISDICTION.

This suit was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 27, 1961, and the Notice of Appeal was filed in that Court by

Appellants on June 23, 1961. The jurisdiction of the Supreme Court to review the District Court's decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b).

STATUTES INVOLVED.

Sections 204(c), 207(a), 210a and 212(a) of the Interstate Commerce Act (49 U. S. C. 304(c), 307(a), 310a and 312(a)) and Section 703 of the Labor Management Reporting and Disclosure Act of 1959, Section 8(e), 73 Stat. 519, 29 U. S. C. 158(e).*

QUESTIONS PRESENTED.

1. Whether temporary service interruptions involving the interchange of freight between non-union motor carriers operating in interstate commerce wholly within the State of Nebraska, and some, but not all, union interstate motor carriers in a particular area arising out of a labor dispute may, consistently with the standards set forth in the Interstate Commerce Act (49 U. S. C. 201 *et seq.*) and the National Transportation Policy, be made the basis for the grant by the Interstate Commerce Commission of permanent operating authority to a non-union carrier in that area.

2. Whether the Commission erroneously used the grant of additional permanent operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) where the appropriate remedy, if any, was a proceeding under Sections 204(c) and 212 of the Interstate Commerce Act (49 U. S. C. 304(c) and 312) to compel the particular carriers to comply with their obligations under their certificates of public convenience and necessity.

*These statutory provisions are reprinted in Appendix A.

STATEMENT OF FACTS.

This controversy had its origin in the attempt of Local 554 of the International Brotherhood of Teamsters, early in 1954, to organize the employees of the twelve carrier stockholders of Nebraska Short Line Carriers, Inc., the successful applicant before the Commission and one of the appellees in this proceeding. The stockholder carriers, who are not unionized, operate in interstate commerce entirely within Nebraska and use Omaha as the principal point at which traffic moving from and to points outside of Nebraska is interchanged with unionized interstate carriers, many of whom are appellants in this proceeding. When its organizational activities directed at the Nebraska carriers proved unsuccessful, the Union in 1956 began to exert pressure upon the unionized interstate carriers in an effort to restrict the interchange of freight with the non-union Nebraska carriers at Omaha and some other less important Nebraska interchange points.

The unionized interstate carriers have collective bargaining agreements with the Union which in 1956 contained the "hot cargo" clause customary at the time, providing that the carrier would not discharge or discipline any employee who refused to cross a picket line or who refused to handle freight produced or tendered by any person who was engaged in any labor dispute with the Union. The clause further provided that the union and its members, either individually or collectively, reserved the right to refuse to handle goods from or to any firm or truck engaged or involved in any controversy with a union and reserved the right to refuse to accept freight from, or to make pickups from, or to make deliveries to establishments where picket lines, strikes, walk-outs or lock-outs existed (R. 103). After May, 1956, as a result of union pressure to effectuate the objectives of the hot cargo clauses, some of the Ne-

braska carriers experienced interchange difficulties with some, but not all, of the interlining carriers. Accordingly, in June of 1956, the Nebraska carriers organized a Nebraska corporation—Nebraska Short Line Carriers, Inc.—for the purpose of operating in interstate commerce as a motor common carrier of general commodities. The assumption was that if Short Line could obtain a certificate of public convenience and necessity from the Commission, and could operate as a non-union carrier, the Nebraska carriers would no longer need to interchange freight with unionized carriers at Omaha.

On June 22, 1956, Short Line filed its first application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067, authorizing operations in interstate commerce between Denver and Chicago, Omaha and Chicago, Minneapolis and Des Moines, and Council Bluffs, Iowa and St. Louis, over regular routes serving intermediate points. By an order dated September 3, 1957, Examiner Donald R. Sutherland of the Interstate Commerce Commission recommended denial of this application (R. 18). On January 10, 1957, Short Line filed its second application seeking a certificate of public convenience and necessity from the Interstate Commerce Commission in Docket No. MC-116067 (Sub No. 2), authorizing operation by it in interstate commerce between Omaha, Nebraska on the one hand, and thirty-two states, on the other. By an order dated August 8, 1957, Examiner Michael B. Driscoll recommended denial of this application (R. 77).

Although the applications were heard on separate records before different Examiners, the Interstate Commerce Commission dealt with them in a single report dated June 1, 1959 (79 MCC-599, R. 99). Examiner Sutherland's decision was reversed in part and affirmed in part. The Commission granted a certificate to Short Line, author-

izing operations "between Omaha on the one hand, and on the other, Chicago, St. Louis and Kansas City, restricted to traffic originated at or destined to points in Nebraska" (R. 118). Examiner Driscoll's recommended report and order was affirmed, and the application filed in MC-116067 (Sub No. 2) was denied. Since December 4, 1956, Short Line has had authority to operate between Omaha and Chicago, St. Louis and Kansas City, pursuant to a temporary certificate granted by the Commission under 49 U. S. C. Sec. 310a.

After the Commission's grant of permanent authority to Short Line, appellants brought a timely action in the District Court to set aside the order. The three-judge District Court upheld the Commission's order and dismissed the complaint, with Judge Mecer dissenting.

The facts as stated by the Examiners in their respective reports are significant because they were adopted by the Commission. Referring to Examiner Sutherland's findings, the Commission stated:

"There is no serious dispute as to the facts. An examination of the record establishes that the pertinent facts are accurately and adequately stated in the report which accompanied the Examiner's recommended order, and we shall adopt such statement as our own, confining our discussion herein to the issues presented by the exceptions and the replies thereto" (R. 107).

Referring to findings of Examiner Driscoll, it stated:

"The pertinent facts of record are adequately stated in the report which accompanied the Examiner's recommended order and we adopt such statement as hereinafter augmented or modified as our own" (R. 110-111).

As a result of the fact that the Commission has adopted the findings of its Examiners, it will be proper to refer to the Examiners' findings as those of the Commission.

Both Examiners found that appellants Burlington and Santa Fe provided uninterrupted service at all times. These findings were adopted by the Commission (R. 54, 55, 82). Burlington serves all of the points embraced within the certificate issued to Short Line (R. 52). Santa Fe is authorized to engage in the transportation of general commodities to, from and between points in Arkansas, Colorado, Kansas, Missouri, Nebraska, New Mexico, Oklahoma and Texas.

Thus, the facts show, on the basis of specific findings by the Commission, that at least two of the appellants provided continuous service at all times to and from the points Short Line received authority to serve. The facts further show, on the basis of the Commission's adoption of Examiner Driscoll's finding that prior to the hearing on the second application, specifically on or about April 3, 1957, Watson, Prucka Transportation, Inc. (predecessor to Interstate Motor System, Inc.), and Independent Truckers, Inc. resumed normal interchange practices at Omaha (R. 94). By adopting the Examiner's findings the Commission acknowledged, as a matter of fact, that there were no interruptions in the service of two carriers and that three others, Watson, Prucka and Independent Truckers, resumed normal operations on or about April 3, 1957 which was more than two years before the Commission's decision.

SUMMARY OF ARGUMENT.

1. The Commission in granting this permanent certificate of operating authority has violated the fundamental objectives and statutory standards of Part II of the Interstate Commerce Act. The certificating provisions of the statute are designed to achieve a long range balance between the demand for, and supply of, transportation services, so as to avoid both the crippling effects of under-

supply, and the destructive tendencies of over-capacity. Such a balance cannot be achieved if permanent certifications are based, as this one was, upon the transitory circumstances of particular labor disputes. Moreover, the evidentiary findings which the Commission adopted established that even at the height of the interchange difficulties experienced as a result of the labor dispute, there were adequate alternative facilities available and that these alternatives were increasing as more of the unionized interlining carriers found that they could successfully resist union pressure. Consequently, in granting a certificate designed solely to insure against the recurrence of interchange difficulties arising from a labor controversy, the Commission ignored its own normal standards for the administration of section 207(a), calling for an evaluation of the adequacy of existing services and the effect of a new service upon existing carriers. In so doing, the Commission in effect substituted an ill-informed judgment with respect to labor considerations outside its special competence for an informed judgment with respect to transportation considerations within its special competence and relevant to its own statutory objectives.

2. The Commission also erred in rejecting the suggestion that a more appropriate remedy, if any was required under the Interstate Commerce Act, would be a complaint proceeding under section 204(c) of the Act. An order entered in such a proceeding would have strengthened the position of those unionized carriers who were already doing everything within their power to resist union pressure and would have penalized only those carriers who the Commission found had not made an earnest effort to provide interlining services with non-union carriers. Such a remedy would also have avoided the anomalous result of permanently certifying new transportation services in an area where existing services were already more than

adequate to meet normal needs. Finally, the Commission's own previous experience with similar situations indicated the appropriateness of a complaint proceeding and a cease and desist order to guard against the recurrence of transportation difficulties arising from secondary boycotts in labor disputes. The Commission's summary rejection of the suggestion that the non-union carriers be remitted to this alternative remedy was therefore without rational justification and was an abuse of its discretion under the Interstate Commerce Act.

ARGUMENT.

I.

THE COMMISSION VIOLATED RECOGNIZED STANDARDS FOR THE ADMINISTRATION OF THE CERTIFICATING PROVISIONS OF THE INTERSTATE COMMERCE ACT (207(a)) BY ISSUING A PERMANENT GRANT OF OPERATING AUTHORITY IN ORDER TO ELIMINATE TEMPORARY INTERCHANGE DIFFICULTIES RESULTING FROM A LABOR DISPUTE.

The order of the Commission in this case is unique in the history of the administration of the certificating provisions of Part II of the Interstate Commerce Act. This uniqueness arises not only from the fact that the Commission undertook to relieve certain non-union motor carriers from the temporary embarrassment of unionizing pressures by a permanent grant of operating authority in interstate commerce to their chosen instrument, a wholly-owned subsidiary, committed to non-union operations. Even more important to the responsibilities of this Court is the fact that the Commission in providing this remedy completely ignored the standards for the administration of section 207(a) of the Act which the Commission itself has developed and which the Courts have uniformly sustained. It is this departure from the normal standards of administration in order to correct a temporary situation which the Commission mistakenly believed could not otherwise be corrected that requires the emphatic disapproval of this Court.

Early in its administration of Part II of the Interstate Commerce Act, the Commission formulated the standards which it proposed to follow in determining public conve-

nience and necessity under section 207(a). In *Pan American Bus Lines*, 1 M. C. C. 190 (1936), the Commission, elaborated the controlling tests in the following passage:

"The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." (p. 203.)

Of course, it would be disingenuous to assert that the Commission has always achieved or even approached perfect consistency in the application of these tests. Nevertheless, the Commission has never avowedly discarded them and has in recent years successfully defended its determinations by resort to substantially the same basic principles. *Filson v. I. C. C.*, 182 F. Supp. 675; *Associated Transports Inc. v. United States*, 169 F. Supp. 769. See, too, *Hudson Transit Lines v. United States*, 82 F. Supp. 153. And certainly, rarely, if ever, has the Commission so flagrantly departed from those principles, as it did, in attempting to meet what it erroneously regarded as the peculiar exigencies of this particular situation.

In order to appreciate the full extent of the Commission's departure from normal standards for administering section 207(a) of the Act, it is necessary to compare in some detail the evidentiary findings of the Examiners, which the Commission adopted as its own, with the ultimate conclusions which the Commission substituted in place of those of the Examiners. The evidentiary findings of Examiner Sutherland detailed the difficulties which some of the stockholder carriers had experienced in interchanging freight with some of the unionized carriers, particularly at the Omaha Gateway. These findings also detailed how some

of the shippers or consignees served by the unionized carriers had suffered either in delayed service or in additional charges on account of these difficulties. However, in every instance where the Examiner found that one of the stockholder carriers had experienced interchange difficulties or suffered financially because some of the interlining carriers were routing incoming freight over a different line, the Examiner also found that the same Nebraska carriers were able to interchange freely with other unionized carriers, particularly Burlington, Santa Fe Trail, Bos Truck Lines, D. M. T. and National Carloading, serving the same area (R. 22, 23, 24, 25, 27, 28). Similarly, in substantially every case where delays or extra expenses had resulted from re-routing of traffic normally handled by the stockholder carriers, the Examiner also found that the shipper or consignee would have no objection if the goods were originally shipped via the unionized carriers who were interchanging freely with the stockholder carriers (R. 30, 36, 40, 41, 42, 45, 46). It was on the basis of these detailed evidentiary findings that Examiner Sutherland made his crucial ultimate findings in the following passage:

"As previously indicated, there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that the real parties in interest who are aggrieved by this practice should file a complaint with this Commission under Part II of the act. In any event, since no complaint has been filed by any of applicant's stockholders with this agency, the Commission has not had an opportunity to test the effectiveness of that procedure. Certainly, it cannot be assumed that the Commission's procedure thereunder would be ineffectual. Although applicant cites the *Planters Nut* case, *supra*, [31 M'C 719] to sustain its argument that additional motor carrier authority is needed to correct the situation, it should be borne in mind that that was a complaint case and the Commission issued an order re-

quiring certain specified carriers to cease and desist from certain interchange practices found to be unlawful. In the instant proceeding, for a certificate, those aggrieved by the practices of abnormal interchange conditions are not separated from those that have no complaint, and, if a certificate is granted on the evidence herein those protesting carriers who have been continuing to interchange normally would be injured along with those who have not conducted normal interchange with certain of applicant's stockholders. On the question of whether a grant of the authority sought would endanger or impair the operations of existing carriers contrary to the public interest, it cannot be said that protestants and other unionized carriers are not now enjoying the traffic involved. On the contrary, they are transporting the traffic over their respective portions of the routes involved and the shipments are moving through to destinations" (R. 68-69).

Examiner Driscoll also found substantial indications that more of the unionized carriers would soon manage to interchange freely at the Omaha Gateway with the non-union carriers. He elaborated this finding in the following passage:

"* * * Most of the carriers serving Omaha have terminals there, and many of those are large carriers, operating large, or relatively large, fleets of equipment. Most of those carriers admit some difficulties in handling jointline freight with eastern Nebraska carriers, but all of them insist that, if conditions were normal, they could and would provide good interchange service and good highway service. All of them declare that, except for conditions not due to their initiative nor desire, they have been ready, able and willing to provide service for all traffic offered by shippers or connecting carriers. For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy

is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers. It was explained that, where picket lines exist, there might still be difficulties in interchanging traffic in the usual and normal methods of interchange. All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline carriers will strive to restore to normal their carrier relationships and interchange practices at Omaha." (R. 94.)

As compared with these detailed evidentiary findings and careful evaluations of the total picture, the Commission expressly adopted the detailed findings and then substituted its own evaluation of the total situation in the following passage:

"The breakdown in interchange arrangements at Omaha between the unionized carriers and the stockholder-carriers and the refusal of the unionized carriers to provide pickup and delivery service at establishments where picket lines have been established has resulted in a substantial disruption in motor service to a large portion of the Nebraska shipping public, and the responsibility for the service deficiencies shown to exist must be laid at the doors of the unionized carriers which preempted their obligations to the public. We do not hold that all instances of refusal to provide services are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and

adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers. The apprehensions of certain of the organized carriers that any opposition to the demands of the Union would have resulted in reprisals against them appear greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc., changed its policy against interchange with "unfair" carriers before the close of the hearings herein without experiencing any difficulty. The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by the mere acquiescence in the boycott, the unionized carriers lose the protection which section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby." See *Carpenters' Union v. Labor Board*, 357 U. S. 93. (R. pp. 116-117.)

The preceding paragraph is the principal explanation offered by the Commission for overruling the recommendations of Examiner Sutherland. It will be noted that the Commission gave no consideration at all to the extent to which interchange difficulties could have been avoided by the use of those unionized carriers who continued to interchange freely with the stockholder carriers. It should also be remembered that all the points involved in the certificate granted were served by the freely interchanging carriers, such as Burlington and Santa Fe Trail. There is no indication at all in the record that these carriers could not have handled all the freight that was available if shippers and the non-union carriers had routed the traffic over their lines. There was, on the other hand, ample evidence, as

Examiner Sutherland found, that the unionized motor carriers were not being operated to capacity, that they were interested in transporting additional traffic, and that they would be injured by the grant of a new authority to an additional carrier (R. 54). These considerations, taken together with the fluidity of the labor situation, convinced Examiner Sutherland that, even if some remedy was appropriate, it was not a situation justifying the grant of a new operating certificate. The Commission, on the other hand, gave no explanation of how its ultimate opposite conclusion could be reconciled with the evidentiary findings.

This fatal contradiction between the evidentiary findings adopted by the Commission and its own ultimate conclusion was aptly summarized by Judge Mercer in the following passage of his dissenting opinion:

"We are not here confronted with a mere failure to find, expressly, that the existing carrier facilities and service capabilities are inadequate. What we are confronted with are findings of fact adopted by the Commission which led to only one conclusion, namely, that existing carrier facilities and service capabilities are adequate. In my opinion, the ultimate finding of public convenience and necessity for granting the Short Line operating rights is diametrically opposed to those basic findings of fact." (R. 263.)

The Commission's reasoning is all the more difficult to follow, because of its failure to appreciate the significance, for the underlying labor difficulty, of this Court's decision in *Local 1976 v. N. L. R. B.*, 357 U. S. 93 (1958), holding that union efforts to enforce hot cargo clauses, identical to those involved in the present case, were unlawful under the National Labor Relations Act. In taking note of that decision, the Commission chose only to emphasize the qualification that voluntary observance of the hot cargo clause by an employer, without union coercion, would not itself be a violation of the Labor Act (R. 117). In so doing, the

Commission seems to have entirely ignored the basic principle of the decision, which was especially pertinent to this particular situation, namely, that union pressure designed to effectuate the purpose of the hot cargo clause is unlawful and subject to relief under the National Labor Relations Act.

The record and the findings of the Examiners in this case left no doubt that the unionized carriers themselves had no interest in invoking the hot cargo clauses and did so only in response to union pressure and fear of labor difficulties (R. 95). This Court's decision plainly strengthened the position of those carriers who had already refused to yield to union pressure and lent more, rather than less, credence to Examiner Driscoll's conclusion that the other principal unionized carriers would be likely to effectuate their announced policy of interchanging freely with the non-union carriers. In this connection, it is not necessary to determine whether the 1959 amendment of the National Labor Relations Act (29 U. S. C., Sec. 158(e)) will make extremely unlikely, as the Commission suggested in its Motion to Affirm, the recurrence of any such situation as gave rise to the interchange difficulties between the union and non-union carriers. It is true that this amendment was apparently designed to nullify effectively hot cargo clauses such as those involved in the present controversy. But there was no need for the Commission to have been clairvoyant in foreseeing exactly how the labor difficulties would eventually be resolved. All that was required of the Commission was that it be as circumspect as were its Examiners in recognizing that an accurate assessment of the labor situation was beyond their competence and in concentrating instead upon the long run characteristics of the transportation situation which were within their special competence.

The certificating provisions of the Interstate Commerce Act are, of course, designed to achieve a delicate long

range balance between the supply of, and the demand for, transportation services, as accurately measured as the frailties of human judgment will permit. Obviously, these long term objectives will be frustrated if the Commission makes permanent grants of operating authority to remedy the transitory circumstances of complex labor disputes without the most careful evaluation of the controlling transportation considerations. It is because the Commission failed to make such an evaluation in accordance with its responsibilities under the Interstate Commerce Act that it has placed itself in the untenable position of having granted permanent operating authority to remedy a temporary situation which the Commission itself now suggests is unlikely to recur.

Comparison of the circumstances of this case with others relied upon by the government as instances in which the Commission's grant of a certificate of operating authority has been sustained, only serves to emphasize the extent of the Commission's departure herein from the normal standards of its administration of the Interstate Commerce Act. In *United States v. Detroit Navigation Co.*, 360 U. S. 236, for example, where this Court sustained the Commission's grant of a certificate to operate as a common carrier by water, the Commission made explicit findings with respect to the need for the applicant's services in the following terms:

"The record establishes that there was a definite need for applicants' vessels in the transportation of motor vehicles between Detroit and Lake Erie ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also shows with reasonable certainty that there will be a like need for them in that service at the termination of the war or when normal production and shipment by water or motor vehicles for civilian use are resumed. Witnesses representing manufacturers producing the bulk of the

automobiles at Detroit testified as to this need in the future, not only as to transportation between Detroit and Lake Erie ports but also to Lake Superior ports; that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941; and that with the resumption of automobile manufacture the use of applicants' facilities will be necessary in the handling of such traffic. Refusal of applicants' right to initiate such operations with their own vessels might seriously impair their investment in those vessels and while that fact is not controlling, the refusal would according to this record deprive shippers of necessary transportation facilities which would not be in the public interest." (T. J. McCarthy S. S. Co. Common Carrier Application, 260 I. C. C. 175 at 181-182.)

Similarly, in *I. C. C. v. Parker*, 326 U. S. 60, this Court, in response to the contention that there was a "failure of proof as to the convenience and necessity for a new motor truck operation in the territory," summarized the relevant findings of the Commission as follows:

"In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service. Appellants take the position that this precise issue need not be decided in this case. They look upon the application as asking for authority to improve 'an existing service'. We think that it was for a motor service to improve an existing rail service. Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M. C. C. 725-26, we hold that the Com-

mission had statutory authority and administrative discretion to order the certificates to issue. The public is entitled to the benefits of improved transportation. Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is found not 'unduly prejudicial' to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service.' 326 U. S. at 69-70.)

And finally in *Davidson Transfer & Storage v. United States*, 42 F. Supp. 215, where the Commission's grant of a certificate to perform a particular type of motor carrier operation was sustained, the Commission in its report examined the adequacy of the existing services of this particular type, and concluded with the following finding:

"Protestant motor carriers serve a substantial number of large shippers of foods requiring temperature control between Washington and New York City and the limited number of refrigeration units operated by them are in active service. As a matter of fact, four additional units are being built by them to take care of their existing accounts. Other shippers desiring service on small lots between Philadelphia and Washington have been accommodated only when these carriers lack full loads from shippers regularly served by them. Such occasional service has not been sufficient to satisfy the needs of shippers at Philadelphia. The grant of operating authority herein will not deprive existing carriers of an appreciable amount of traffic since applicant will supply a service not presently available." (42 F. Supp. at 218.)

The Report of the Commission in this case will be searched in vain for any comparable evaluation of the adequacy of existing transportation facilities to provide the services required. The most that will be found is a summary of interchange difficulties experienced by some of

the non-union carriers with some of the union carriers, accompanied, however, by affirmative indications that those difficulties were being overcome, by the time of the second hearing, by the existing carriers. In spite of these indications, and without even considering the adequacy of the existing alternatives or the injury to the existing carriers, the Commission undertook to prevent the possible recurrence of such difficulties by certifying a new non-union carrier. It should be noted in passing that the entire efficacy of even this solution depended upon the assumption that the new carrier would be able to insulate itself from the normal vicissitudes of labor controversies—an assumption already contradicted by the records of the National Labor Relations Board.* Thus, in introducing this novel conception of its responsibilities under the Interstate Commerce Act, the Commission ignored the standards of its own statute, while at the same time exposing its naivete in the field of labor relations. Where an administrative agency strays in this fashion from the area of its own special competence, the basic reasons for the principle of judicial deference to administrative expertise cease to have any valid application.

Consequently, both because of the transportation considerations which it ignored, and because of the labor considerations by which it was mistakenly guided, the Commission's decision must be found beyond the scope of its authority and an abuse of its discretion under the Interstate-Commerce Act.

* *Madden v. Local 710, IBT*, U. S. District Court, Northern District of Illinois, Docket No. 61 C 960 (Appendix E, Jurisdictional Statement, p. 188).

II.

THE COMMISSION ORDER WAS ALSO ARBITRARY AND CONTRARY TO THE STANDARDS OF THE STATUTE BECAUSE IT DISREGARDED OTHER MORE APPROPRIATE REMEDIES PROVIDED BY THE INTERSTATE COMMERCE ACT ITSELF, PARTICULARLY SECTION 204(c).

The Commission's decision in this case is all the more inexplicable because it summarily brushed aside, without adequate explanation, the suggestion that the other remedies under the Interstate Commerce Act were more appropriately designed to meet this particular situation, if any remedy at all was required.

The situation which gave rise to the filing of the Short Line applications was admittedly abnormal and solely attributable to a labor dispute. The Commission, in order to relieve the alleged unusual deficiency in service by some but not all of the carriers, granted temporary authority to Nebraska Short Line Carriers, Inc. on December 4, 1956, pursuant to 49 U. S. C. 310a(a). Short Line has been operating under that authority since. This action was sufficient to cope with the abnormal and temporary condition created by the labor situation.* Thus the Commission in one respect exercised the authority granted to it to deal with temporary deficiencies in transportation service.

After granting temporary authority to Short Line, the Commission had still additional powers with which to deal with those carriers which could be proved to have breached

* In recommending the enactment of Section 210a(a) (49 U. S. C. 310a(a)), the Interstate Commerce Commission itself said: "Cases arise, and have been brought to our attention, where urgent need for interstate motor carrier service suddenly develops." * * *

"We believe that the Commission should have power to meet such emergencies by a grant of temporary operating authority, in its discretion and without hearings or other proceedings." S. Doc. No. 154, 75th Cong. 3d Sess. 2-3.

their duty to serve the public under their certificates and the Interstate Commerce Act. It will be recalled that Examiner Sutherland, in his final evaluation, concluded that "there are only a few of applicant's stockholders who are having interchange difficulties of any consequence. It would seem, therefore, that real parties in interest who are aggrieved by this practice should file a complaint with the Commission under Part II of the Act" (R. 68). The Commission disposed of this suggestion simply by saying: "The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers, does not alter the situation or deprive any carrier of the right to follow the course here chosen" (R. 117).

Of course, the availability of another remedy did not deprive the parties of the right to ask for either remedy or both. But this right of the parties did not relieve the Commission of the obligation to make a rational choice between all the available remedies. The particular findings of the Commission themselves demonstrate that no such rational choice was made. Thus, in rejecting the argument that the organized carriers were justified in yielding to union pressure, the Commission said:

"The apprehensions of certain of the organized carriers that any opposition to the demands of the union would have resulted in reprisals against them appear greatly exaggerated. Certain of them, for example, principally the railroad affiliates, have made an honest effort to continue their interline activities, and at least one large carrier, Watson Bros. Transportation Co., Inc., changed its policy against interlining with 'unfair' carriers before the close of the hearings herein without experiencing any difficulty" (R. 16).

The distinction thus drawn by the Commission itself between the unionized carriers who did and did not fulfill their obligations certainly suggested that the more appro-

priate remedy would be the issuance of an order under section 204(c) requiring the defaulting carriers to live up to their obligations, if indeed they had not done so, rather than the certificating of a new carrier to compete with innocent and guilty alike.

This point too was aptly stated by Judge Mercer in his dissenting opinion where he said:

"I find the suggestion that Burlington, Santa Fe, and the other interstate carriers who continued normal interchange with the stockholder carriers are not affected or injured by the order to be a completely unrealistic concept. As I have previously pointed out the Commission found that these carriers were operating at less than maximum capacity for their equipment and facilities, and that they, along with the other interstate motor carriers had been enjoying the traffic which Short Line sought by its application. The order deprives the guilty and the innocent alike of traffic which they otherwise would enjoy.

I think the evil of the order lies in a simple but very significant fact which both the Commission and the majority of this court overlook, namely, that the basic findings of the Commission's report and the evidence adduced before the hearing examiner are geared to the complaint procedures established by Section 212 of the Act, 49 U. S. C. 312; not to the procedure contemplated by the express provisions of Section 207" (R. 265-266).

The aptness of the alternative remedy is further emphasized by its use by the Commission in comparable situations. Most closely comparable is the decision of the Commission in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 MCC 617 (1957), a complaint proceeding under Section 204(c) of the Act, in which it was asserted that the defendant carriers had "refused to accept certain shipments; tendered to them by complainant at Oklahoma City, Oklahoma, in violation of their common carrier obligations,

the specific provisions of their operating authorities, and the provisions of their published tariffs" (73 M.C.C. at p. 618). The defendant carriers sought to excuse their refusal to accept traffic tendered on the grounds that their actions were "attributable entirely to their obligations under existing contracts with the union which they were forced to sign under duress, that they took all such action as might reasonably have been expected of them to fulfill their common carrier obligations in the situation presented, and that they should, therefore, be excused from such obligations" (73 M.C.C. at p. 624). The Commission rejecting this defense found that such refusals were unlawful, particularly with respect to the failure of such defendants to provide adequate service, to observe just and reasonable practices, and to comply with the provisions of their tariffs lawfully on file with this Commission * * * (73 M.C.C. at p. 630) and issued an order requiring the defendants to refrain from similar practices in the future. In explanation of its decision, the Commission referred to two earlier decisions, *Planters Nut and Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719, and *Montgomery Ward, Inc. v. Santa Fe Trail Transportation Co.*, 42 M.C.C. 212, refusing to accept similar excuses and added this comment:

"* * * We cite these two reports with approval and reject defendants' contentions that the principles announced are obsolete and must be revised in view of the increasingly prominent role which labor unions have since attained in the transportation industry. We find no basis for the suggestion that the provisions of the act and the duties and obligations of common carriers thereunder are subordinate to requirements of labor unions" (73 M.C.C. at p. 627).

To the extent that some of the appellants in this proceeding somehow failed, as the Commission's report suggests, to offer appropriate resistance to the union demands,

it is difficult to perceive why an order similar to that issued in the *Galveston* case, 73 M.C.C. 617, would not have been equally well-adapted to the needs of the situation. The only explanation offered by the Commission for the difference in treatment between the *Galveston* and the instant case was that "the labor difficulties upon which the cited proceedings was based had, with one minor exception, ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing" (R. 118.) * This explanation might have had some relevance if it had been addressed to the relative mootness of the two proceedings. It shed no light on the relative appropriateness of the different remedies applied to the two situations. Furthermore, at the time of the hearing in the present case, it was already apparent, as shown by the findings of the Examiners, that the interchange difficulties were on the wane, as a result of the resistance of some of the stronger carriers. At the time of the decision of the Commission, it should have been equally apparent, thanks to the decision of this Court in the *Local 1967* case, 357 U. S. 93, that the resistance of the carriers would increase rather than diminish and that the interchange difficulties themselves in all likelihood would be completely overcome. Of course, it may be suggested that no matter what legal remedies might be available, there could be no complete assurance that the International Union would not still find ways to embarrass connections between union and non-union carriers. By the same token, there could be no assurance that the newly certificated non-union carrier, Nebraska Short Line, would not encounter union difficulties when it entered the channels of interstate commerce and had to deal directly with unionized terminals and shippers. Again, it may be said that the Commission could not be expected to

foresee that Nebraska Short Line would in fact, as the records of the National Labor Relations Board demonstrate, shortly experience just such difficulties. What past experience did affirmatively indicate was that the only reliable and appropriate remedies for such labor difficulties were those provided by the Labor Act, supplemented by the Commission's insistence that all carriers certificated under the Interstate Commerce Act fulfil their statutory obligations.

Doubtless, it will be suggested in response that all these matters pertain to the exercise of administrative discretion and that the courts should not substitute their judgment for that of the Commission. But as this Court has had occasion to remind this and other administrative agencies, administrative discretion is no excuse for the lack of rational explanation for the course of administrative decisions, and judicial deference is not a liturgy to be mechanically recited and applied whenever the exercise of administrative judgment is questioned, irrespective of the inherent rationality of the explanation offered and its consistency with basic statutory standards and objectives. *S. E. C. v. Chenery Corp.*, 318 U. S. 80; *Shaffer Transportation Co. v. United States*, 355 U. S. 83; *Atlantic Refining Co. v. Public Service Comm.*, 360 U. S. 378; *American Trucking Association, Inc. v. United States*, 364-U. S. 1. In short, judicial deference to administrative expertise, as Judge Henry Friendly has recently so brilliantly demonstrated, should not be conceived as an encouragement to administrative obscurantism and inconsistency, but rather as an accolade to be earned by the reasoned exercise of a peculiarly well-informed judgment. *Friendly, The Federal Administrative Agencies, The Need for Better Definition of Standards*, 73 *Harr. L. Rev.* 863 1055, 1263 (1962). Because the Commission has yet to offer a rational explanation of why it used its certificating powers to make

a permanent change in the competitive situation in this very substantial area of interstate commerce, instead of remitting the initiators of the application to their more appropriate remedies under the Interstate Commerce Act, the order should be set aside.

CONCLUSION.

We have demonstrated that the Commission has available to it specific remedies with which to cope with temporary and abnormal deficiencies in transportation service in a given area. In addition, by virtue of the complaint provisions of the Act, it has the power to deal with carriers which do not fulfill their obligations under the Act and their certificates of public convenience and necessity. In the instant matter, however, by issuing a permanent certificate of public convenience and necessity to Short Line, the Commission has relied upon peculiar and transitory circumstances to justify the creation of a permanent new competitor for all of the carriers that operate in the area involved. In so doing it has ignored the standards of its own statute while undertaking to resolve the merits of a labor dispute. These actions by the Commission have been, we submit, beyond its jurisdiction and an abuse of its discretion. Therefore the decision of the District Court should be reversed.

Respectfully submitted,

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1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid, to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

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APPENDIX.

Section 204(c), Interstate Commerce Act, 49 U. S. C. 304(c).

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 207(a), Interstate Commerce Act, 49 U. S. C. 307(a).

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part ~~and the~~ requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a

regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Section 212(a), Interstate Commerce Act, 49 U. S. C. 312(a).

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or

broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a); or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

**Section 210a(a), Interstate Commerce Act, 49 U. S. C.
310a(a).**

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.*

* The Commission has extended Short Lines' temporary authority beyond 180 days and Short Line is still operating pursuant to the temporary authority granted December 4, 1956. The Commission has statutory authority to extend the time under a temporary authority grant: *Pan-Atlantic S. S. Corp. v. Atlantic C. L. R. Co.*, 353 U. S. 436 (1957).

**Section 8(e), Labor Management Relations Act,
29 U. S. C. 158(e).**

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purpose of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

AUG 24 1962

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 28

**GENERAL DRIVERS AND HELPERS UNION, LOCAL
554, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,**

Appellant,

vs.

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, AND NEBRASKA SHORT LINE CARRIERS, INC.,**

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF.

Certificate of Service Appended at Page 22.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962.

No. 28.

**GENERAL DRIVERS AND HELPERS UNION, LOCAL
554, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,**

Appellant,

vs.

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, AND NEBRASKA SHORT LINE CARRIERS, INC.,**

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF.

OPINIONS.

The opinion of the United States District Court for the Southern District of Illinois is reported in 194 F. Supp. 31. A copy of the opinion appears in the printed record (R. 209). The report and order of the Interstate Commerce Commission is reported in 79 M. C. C. 599 and is in the printed record (R. 99).

JURISDICTION.

This action is brought pursuant to the provisions of 28 U. S. C. 1336, to set aside an order of the Interstate Commerce Commission. On April 27, 1961, a judgment of the District Court for the Southern District of Illinois, Northern Division, was entered; a notice of appeal was filed in that court by appellant on June 22, 1961. Jurisdiction of the Supreme Court to review this decision by direct appeal is pursuant to 28 U. S. C. 1253 and 2101(b). Jurisdiction of the Supreme Court to review this judgment on direct appeal is sustained in the following cases: *American Trucking Association, Inc. v. United States*, 364 U. S. 1; *Schaffer Transportation Company v. United States*, 355 U. S. 83; *M. & M. Transportation Co. v. United States*, 350 U. S. 857.

STATUTES INVOLVED.

Sections 207(a) and 212 of the Interstate Commerce Act, 49 U. S. C. 307(a) and 312; and Section 703(8)(e) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 8(3).

QUESTIONS PRESENTED.

1. Whether the issuance of Motion Carrier Certificates by the Interstate Commerce Commission as a result of labor disputes and because of the non-union character of applicant exceeds the statutory power of the Commission and is contrary to the policy of Congress.
2. Whether the request for operating authority by Nebraska Short Line Carriers, Inc., Appellee, was based primarily on facts and circumstances within the exclusive jurisdiction of the National Labor

Relations Board and outside the jurisdiction of the Interstate Commerce Commission.

3. Whether temporary interruptions of interlining between non-union intrastate motor carriers and some interstate motor carriers in a particular area arising out of a labor dispute, may, consistent with the standards set forth in the Interstate Commerce Act and National Transportation Policy be made the basis for the grant of permanent operating authority to a non-union carrier in that area.
4. Whether the Commission erroneously used the grant of additional operating authority under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a situation where the appropriate remedy, if any, was a proceeding under Section 212 of the Interstate Commerce Act (49 U. S. C. 312) to compel certain carriers to comply with their obligations under their Certificates of Public Convenience and Necessity.

STATEMENT.

This appeal is based on an action by the Burlington Truck Lines, Inc., a corporation, against the Interstate Commerce Commission and the United States of America, in which Burlington Truck Lines, Inc., appellant herein, requested the Federal District Court to enter a decree to adjudge the orders of the Interstate Commerce Commission entered June 1, 1959, and March 10, 1960, in the matter of Nebraska Short Line Carriers, Inc.,—Common Carrier Application—Doc. No. MC-116067 to be unlawful, null and void and in violation of the Interstate Commerce Act. Appellant, General Drivers and Helpers Union Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, intervened in this proceeding alleging substantially the

same matters that were stated in the original complaint of Burlington Truck Lines, Inc.

In addition some nine motor carriers intervened and each based intervention on substantially the same allegations.

Nebraska Short Line Carriers, Inc., appellee herein, and the applicant before the Commission, is a Nebraska corporation organized by twelve intrastate Nebraska motor carriers; it sought rights from the Interstate Commerce Commission because of the fact that existing carriers were alleged to have declined to perform interchange operations with motor carriers that were stockholders in Nebraska Short Line Carriers, Inc. All stockholders of Nebraska Short Line Carriers, Inc., are non-union carriers who have been subjected to union organizational activity and who desire to operate as non-union carriers.

The factual situation involved herein began some time in 1955 when the Teamsters union undertook to organize common carrier employees in Nebraska. Several primary strikes occurred at this time, including one against one of the stockholders of Nebraska Short Line Carriers, Inc., Clark Brothers Transfer Company. In addition to this, other stockholder carriers of Nebraska Short Line Carriers, Inc., were contacted by Teamster representatives for organization purposes and also for purposes of executing collective bargaining agreements. When the stockholder carriers refused, the Teamster union invoked the provisions of Article IX of their agreement, sometimes referred to as the "hot cargo" clause (R. 79-80-81). Appellants are unionized carriers who have executed collective bargaining agreements with the Teamsters union containing "hot cargo" clauses. These clauses are properly referred to as "protection of rights" clauses; they provide that the carrier will not discharge or discipline any employee who

refuses to cross a picket line or handle unfair goods, which unfair freight and goods have been designated such by the Teamsters because of a labor dispute.

Nebraska Short Line Carriers, Inc., filed an application seeking a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission on June 22, 1956; the case was designated as Doc. No. MC-116067. The matter was heard over an extensive period of time by Trial Examiner Donald R. Sutherland of the Interstate Commerce Commission, who, in an order dated September 3, 1957, recommended denial of the application (R. 18-69). Nebraska Short Line Carriers, Inc., on January 10, 1957, filed another application seeking a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission in Doc. No. MC-116067, sub No. 2. On August 8, 1957, Trial Examiner Michael B. Driscoll recommended that the application be denied (R. 78-97).

Thereafter, the matters were orally argued to the Interstate Commerce Commission in a combined hearing and the Commission on June 1, 1959, partially granted said applications in a single report (R. 99-119). The denial of the application by Examiner Driscoll was affirmed by the Interstate Commerce Commission; Examiner Sutherland's decision was reversed in part and affirmed in part.

The finding of facts in both Trial Examiners' reports indicated that the temporary interchange interruptions arose as a result of a labor dispute. This is borne out by Examiner Driscoll's findings of fact (R. 83) in which it was stated:

12. *As a corporation, applicant has now no policy on unionization, but it does have a firm policy to the effect that, under no conditions, would it ever agree to a Union contract containing any hot cargo provisions. It is so firm on that point that it offered, through an amendment, to have any issued certificate contain a*

provision to the effect that, if it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation. (Emphasis supplied.)

To further substantiate the existence of a labor dispute that resulted in temporary interchange interruptions, Examiner Driscoll found as follows:

"38. The trunkline carriers have union contracts. *The eastern Nebraska carriers are for the most part small or relatively small business men. Most of them are obviously opposed to unionization of their business. This Commission has no authority nor means of solving that problem. If, as some eastern Nebraska carriers imply, the National Labor Relations Board does not offer a solution to that problem, then it obviously is a problem that only the Legislative Branch of the Federal Government could solve. Certainly, this Commission is in no position to solve it.*" (R. 96.) (Emphasis supplied.)

"39. The principle recommended for application to this particular proceeding can be stated in this way: To the extent that the interchange and service defects and inadequacies complained of have been actually due to labor difficulties, and if, as to those difficulties, the carriers immediately affected have exercised such diligence and prudence as would normally be exercised by a business man faced with such difficulties, then, and to that extent, their services and interchange practices will not be considered inadequate for public convenience and necessity purposes." (R. 97.)

"(fol. 84.) 40. When that principle is applied here, it must be found that, so far as labor difficulties have affected interchange practices and services, the trunkline carriers are entitled to a protective finding." (R. 97.)

"41. When that conclusion is made, there is nothing much left upon which a finding of public necessity could be based. Denial of the application must therefore be recommended." (R. 97.)

The Commission has for the most part adopted the findings of its Examiners. The Appellants will refer to the Examiners' findings as those of the Commission. Appellants vigorously contended before the two Examiners and the Interstate Commerce Commission and the Federal District Court that the facts as found by the Commission do not as a matter of law support its decision; it was asserted by Appellants that the Commission acted beyond its statutory power in this matter. However, it is asserted in this Brief by Appellant that the findings of the Examiners, which findings were adopted by the Commission, indicate that the Commission had no authority or means of solving the problem of the labor dispute. This Appellant asserts that the Commission itself, by adopting the Examiners' findings, which findings were premised primarily upon the existence of a labor dispute, could not, as a matter of law, find that Appellees were entitled to the rights granted.

Both Examiners' reports indicate that the basis for applicants' request for authority was because of their non-union status.

After the Commission's grant of authority, and within proper time limits, appellant Burlington Truck Lines, Inc., brought an action to set aside the order. General Drivers and Helpers Union Local 554 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, intervened in this action. The Three Judge District Court upheld the Commission's order and dismissed the complaint, one of the judges, Judge Mercer, dissenting (R. 70).

SUMMARY OF ARGUMENT.

- (A) The Issuance of Motor Carrier Certificates by the Interstate Commerce Commission as a Result of Labor Disputes and Because of the Non-Union Character of Applicants Exceeds the Statutory Power of the Commission and Is Contrary to the Policy of Congress.
- (B) The Request for Operating Authority by Nebraska Short Line Carriers, Inc., Appellee, Was Based Primarily on Facts and Circumstances Within the Exclusive Jurisdiction of the National Labor Relations Board and Outside the Jurisdiction of the Interstate Commerce Commission.
- (C) Temporary Interruptions of Interlining Between Non-Union Intrastate Motor Carriers and Some Interstate Motor Carriers in a Particular Area Arising Out of a Labor Dispute May Not, Consistently With the Standards Set Forth in the Interstate Commerce Act and the National Transportation Policy, Be Made the Basis for the Grant of Permanent Operating Authority to a Non-Union Carrier in That Area.
- (D) The Commission Erroneously Used the Grant of Additional Operating Authority Under Section 207 of the Interstate Commerce Act (49 U. S. C. 307) in a Situation Where the Appropriate Remedy, If Any, Was a Proceeding Under Section 212 of the Interstate Commerce Act (49 U. S. C. 312) to Compel Certain Carriers to Comply With Their Obligations Under Their Certificates of Public Convenience and Necessity.

With respect to the evidentiary matter involved in this proceedings, Appellant adopts the position of the dissenting Judge Mercer that the order should be set aside for

the reason that the finding of public convenience and necessity is contrary to the evidentiary findings of the Commission upon which the ultimate finding is based. In every application for authority to operate as a common carrier, the Commission must determine the adequacy of the facilities of existing carriers as a preface to its decision. The basic findings of fact by the Commission are contrary to the proposition that the existing carrier facilities and service capabilities are inadequate.

It is strenuously urged by the Appellant that the Commission has no jurisdiction to enter the order under review. As Judge Mercer stated in his dissenting opinion:

"The hard core of this whole case is one fact, namely, the existence of a labor dispute between Local 544 and certain of the stockholder carriers. Any doubt as to the large effect of that fact is dispelled by reading the Commission's report. Most significant, I think, is the fact that the Commission found it necessary to devote paragraph after paragraph and several pages of its report to a discussion of the labor aspects of the case and to an explanation that it was not (fol. 2934) deciding that labor issue. In like manner, in approaching the conclusion that the order of the Commission is valid, the majority of the court devotes some 15 typewritten pages of opinion to the labor aspects of the case, to the duty of a common carrier to the public despite labor involvement and to a discussion of the lack of any decision on a labor dispute in the Commission's disposition of this case." (Emphasis supplied, R. 264, 265.)

The labor aspects of this case furnished the Commission with an opportunity to grant authorities of public convenience and necessity to applicant beyond that granted by the Interstate Commerce Act.

ARGUMENT.

(A)

The Interstate Commerce Commission does not have power to determine labor disputes, even those involving common carriers. It has the power of granting Motor Carrier Certificates and of determining complaint cases involving refusal of motor carriers to service shippers and to prevent discrimination with regard to shippers. The power to issue certificates authorizing the institution of motor carrier service was granted to the Commission in order to enable it to authorize such services in the areas where a permanent need for such services was shown. This power was never intended as an instrument for the solution of labor disputes or the resolution of labor problems.

Although the Commission has stated in its decision and order granting the rights involved in this matter, that it is not resolving a labor dispute or involving itself in labor problems in any manner or form, it is obvious from the facts in this matter that the Commission has relied primarily upon a labor dispute situation and the non-union character of applicant as the basis for granting interstate operating rights. Despite statements to the contrary in the decision of the Interstate Commerce Commission, its decision is based primarily upon an evaluation of a labor dispute. It is very significant that in Trial Examiner Driscoll's report (R. 83) a finding was made, based upon the statement of applicant, that if issued a certificate of convenience and necessity, such a certificate could contain a provision to the effect that, "If it were faced with the alternate of signing such a contract or going out of business, it would surrender its certificate for cancellation."

Applicant further stated to the Trial Examiner that under no conditions would it ever agree to a union contract containing any "hot cargo" provisions. Can the Commission disregard this statement that applicant voluntarily made in one of its proceedings and grant the application, which concerned itself primarily with a refusal to sign and execute a union contract containing a "hot cargo" provision? Obviously, the "hot cargo" clause must have been the basis for applying for interstate operating rights by the Nebraska Short Line Carriers, Inc.

Prior to the 1959 amendments (Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 158, 73 Stat. 543, Section 8(e), Section 703(b), 73 Stat. 519) union inducement of concerted work stoppages to compel adoption or enforcement of hot cargo agreements was unlawful under the secondary-boycott ban. However, this Court held, in *Carpenters, Local 1976 v. NLRB*, 357 U. S. 93, commonly known as the Sand Door case, although union inducement of work stoppages to enforce hot cargo agreements violated the secondary-boycott ban, *the voluntary observance of a hot-cargo agreement by an employer did not violate that ban, and that the mere execution of a hot cargo agreement was not, in itself, inducement of employees to refuse to handle hot cargo, in violation of the ban.* This ruling, it is submitted, is still applicable under the 1959 amendments. Under the 1959 amendment, a protection of rights clause (hot cargo) would not necessarily violate Section 8(e) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 158, 73 Stat. 543).

The 1959 amendments (Section 8(e), Section 703(b), 73 Stat. 519, Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 158, 73 Stat. 543) bans express or implied hot cargo agreements between employers and unions and makes the entering into of any such agreements an unfair labor practice on the part of both employers and

unions; in addition it declared such agreements void and unenforceable. If this clause constitutes the basis for Nebraska Short Line Carriers, Inc., application for certificate of convenience and necessity, then the reason for the application has been delimited by Congressional action. It is the contention of Appellant that all agreements included within the "hot cargo" category were not banned by Section 8(e) of the Act; in other words, such clauses may be constructed in such a manner so as to not come within the purview of the proscriptions as set out in Section 8(e).

The power to issue motor carrier certificates by the Interstate Commerce Commission was never intended as an instrument for the solution of labor disputes. Congress has protected certain activities of employees and their bargaining representatives including the right to strike and to engage in concerted activities as a legitimate means by which labor organizations may represent and bargain for employees pursuant to the provisions of the Labor-Management Relations Act, 29 U. S. C. 1 *et seq.* Power granted to the Commission by Congress was never intended as a weapon to destroy legal collective bargaining clauses and the legitimate objectives and purposes of labor organizations or to authorize the establishment of a new carrier whenever the operations of existing carriers are involved in temporary labor disputes.

There is no assurance that the employees of Nebraska Short Line Carriers, Inc., may not in the future decide to form, join or assist a labor organization and to secure a collective bargaining agreement from it. Perhaps, during collective bargaining, a similar provision to a "hot cargo" clause may be submitted to Nebraska Short Line Carriers, Inc., by a labor organization representing its employees, which clause may meet the legal test. If this situation presented itself to Nebraska Short Line, would it then

surrender the certificate granted by the Commission in consonance with its offer in Examiner Driscoll's Report (R. 83)?

To grant a certificate of convenience and necessity upon the basis of a non-union character of an applicant arising out of a temporary labor dispute and collective bargaining clauses involving the handling or non-handling of freight, would open the door to many application for certificates of convenience and necessity based on labor disputes. The exclusive regulation of labor relations resides in the National Labor Relations Board, not the Interstate Commerce Commission.

(B).

Applicant, to sustain its contentions for the granting of a certificate of convenience and necessity on the basis of the applicant's non-union character and on the basis of alleged secondary boycotts, presents a novel situation and one that is without precedent as the basis for the issuance of motor carrier operative authority. Applicant invoked the jurisdiction of the Interstate Commerce Commission to grant a certificate of convenience and necessity to it on the basis of activities that are exclusively within the purview of the Labor Management Relations Act of 1947, 29 U. S. C. A. 150. Congress, in enacting said Act, considered the extent to which labor practices affecting interstate commerce should be regulated. Without question, it left these matters solely and exclusively to the National Labor Relations Board and to proceedings under the above quoted Act. By such action, the matters involved herein and under which applicant complains are outside the competence of the Interstate Commerce Commission. Congressional policy was set out in the preamble of the statute. Consequently, if applicant or any other neutral employer is involved in an alleged secondary boycott activity on the

part of a union, it has an adequate remedy in the courts and before the National Labor Relations Board pursuant to the provisions of the above statute. Neutrals are protected from involvement in labor disputes by virtue of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. The Court of Appeals for the Second Circuit, with regard to this situation, stated:

"We have here a problem involving the rights of neutrals in a lawful economic war between an employer and a union. The Taft-Hartley Act does not completely shelter neutrals * * * Instead, the Act recognizes and undertakes to reconcile the competing claims of unions to strike and of bystanders to be free of harm from so-called 'secondary boycotts.' "

NLRB v. Service Trade Chauffeurs, 191 F.2d 65, 67 (C. A. 2).

Section 10(a) of the Act is as follows:

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise; * * *"

Congress gave sole and exclusive power to the National Labor Relations Board to prevent unfair labor practices, the same activities as applicant alleges have been involved in this matter.

Perhaps the two most important cases with regard to the exclusive jurisdiction of the National Labor Relations Board are:

Garner v. Teamsters Union, 346 U. S. 485 (1953), and

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955).

In both these cases, this Court refused to pass upon the question of whether the Union's conduct was protected or prohibited under the Act; instead, it left the sole power to administer the Act to the National Labor Relations Board.

Under the Labor Management Relations Act, not only are there prohibitions against certain particular union activities as set forth in Section 8(b), 29 USCA paragraph 158(b), but at the same time, it accorded to labor, in Section 7 of the same Act, rights of self-organization, collective bargaining and concerted action for mutual aid or protection. In addition to the above acts, it is the duty of an employer to bargain collectively in good faith with the representative of his employees. In view of the declared public policy of the Labor Management Relations Act and the fact that it was enacted by Congress in 1947 after passage of the Motor Carrier Act, it is reasonable to say that Congress did not consider that another federal agency, the Interstate Commerce Commission, would intervene in the same area as the National Labor Relations Board on the same subject matter. In *Garner v. Teamsters Union, supra*, the Court stated:

"Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

In a series of decisions, the Supreme Court of the United States has again re-emphasized this doctrine; *Gus v. Utah LRB*, 77 S. Ct. 598; *Amalgamated Meat Cutters v. Fairlawn*, 77 S. Ct. 604; *San Diego Building Trades v. Garmon*, 77 S. Ct. 607. Thus, it is obvious that in recent decisions of this Court, it has been made abundantly clear that reg-

ulation of labor relations and collective bargaining is solely within the jurisdiction of the National Labor Relations Board. Not only are states and administrative agencies of states prohibited from invading the field of labor relations as to industries that affect interstate commerce, but even federal courts and agencies are likewise excluded from this area of regulation, *Weber v. Anheuser-Busch*, *supra* (348 U. S. 479). Granting a certificate of convenience and necessity to the applicant in this matter on the basis of the non-union character of applicant and on the basis of alleged secondary boycott activity by a union, injects the Commission into the area of labor relations and collective bargaining. This invades the basic jurisdiction of another federal agency and opens the door to multitudinous litigation before the Commission. There have been numerous instances where Congress has created an administrative agency and defined the scope of its activities, thereby placing them in a superseding position with respect to another administrative agency: *Eugene Dietzgen Co. v. FTC*, 142 F. 2d 321, 331 (CA 7, 1944), cert. den. 323 U. S. 730 (1944); *United Corp. v. FTC*, 110 F. 2d 473, 475 (CA 4, 1940); *Chamber of Commerce of Minneapolis v. FTC*, 13 F. 2d 673, 685-686 (CA 8, 1926); *U. S. v. Western Union Telegraph Co.*, 53 F. Supp. 377, 381 (S. D. N. Y., 1943); *T. C. Hurst & Son v. FTC*, 268 Fed. 874, 877 (E. D. Va., 1920); *Far East Conference v. U. S.*, 342 U. S. 570, 573-574 (1952); *U. S. v. Rock Royal Cooperative*, 307 U. S. 533, 558-560 (1939); *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 485 (1932); cf. *U. S. v. American Trucking Assns.*, 310 U. S. 534, 544-545 (1940); *Brougham v. Blanton Mfg. Co.*, 249 U. S. 495, 499 (1919).

In two decisions, this Court held the *Weber v. Anheuser-Busch* opinion controlling and that the Labor Management Relations Act of 1947 prevents a state from applying its

laws defining the duties of a common carrier and invalidating the hot cargo provisions in collective bargaining contracts with interstate commerce carriers: *General Drivers, Warehousemen, etc., Local Union 89 v. American Tobacco Co.*, 248 U. S. 978; and *Teamsters, Local 327 v. Korrigán Iron Works*, 353 U. S. 968. In the latter case, carriers and their employees had been enjoined from refusing to cross picket lines at a struck shipper's premises despite the contract clause which allowed employees to refuse to handle the goods of a struck firm. The state court reasoned that a state law requiring carriers to render service gave it authority regardless of the Taft-Hartley Act. In the latter case, this Court, in a per curiam decision, held the opposite.

(C)

Pursuant to the provisions of Section 207 (a) of the Motor Carrier Act, 49 U. S. C. 307 (a), the Commission has authority to assure the public of adequate common carrier service. The National Transportation Policy seeks to foster sound economic conditions in transportation and among the several carriers. There must be a showing of inadequacy of service for the Commission to grant certificates to new carriers.

Labor disputes are temporary in character and eventually either fade out or are settled by the disputants. If the Commission grants certificates to new carriers to serve areas affected by labor disputes, without finding that there is an inadequacy of service, it is submitted that the Commission has misinterpreted the Act by granting permanent rights to meet an admittedly temporary situation. This does not conform to the National Transportation Policy as set out in the Interstate Commerce Act. The Commission recognized in *Montgomery Ward and Company v. Consolidated Freightways*, 42 M. C. C. 225, motor carrier

inability to serve premises where a strike was in progress. Although the Commission in the decision involved disavowed that it was resolving a labor dispute or that the basis of granting rights to Nebraska Short Line Carriers, Inc., was due to a labor dispute, the inescapable conclusion is that the labor dispute was the motivating factor in the application and in the presentation of evidence to the Trial Examiners by applicant. The Commission totally ignored the *Montgomery Ward and Company v. Consolidated Freightways, supra*, case. In addition, there was no dispute in the record and in the recommendations and report of the Trial Examiners that some unionized carriers serviced the areas involved.

Nebraska Short Line Carriers, Inc., applicant, and appellee herein, and its stockholder carriers, as well as shippers, had an adequate remedy for breach of duty against the unionized carriers in the instant matter. Failure to file a complaint against the unionized carriers and to follow this procedure under the Interstate Commerce Act (Section 49, U. S. C. 312) does not warrant the granting of operating authority. Nebraska Short Line Carriers, Inc., and its stockholder carriers, had an adequate opportunity to prevent, by the complaint procedure before the Commission, the very activity of the Teamsters and unionized carriers it complained of during this period.

(D)

Nebraska Short Line Carriers, Inc., in its presentation to the Trial Examiners, and its arguments to the Commission, sought to show that contractual relations between the Teamsters and unionized carriers involving the hot cargo clause and action thereunder by the Teamsters Union, ignited the situation that forced them to apply for operating rights. The labor dispute was admittedly tem-

porary and constituted the motivating factor in the application. Broad authority is granted the Commission under Section 212 of the Motor Carrier Act (49 U. S. C. 312) to compel compliance by a carrier with the duties and obligations imposed upon it by its certificate of public convenience and necessity. Nebraska Short Line Carriers, Inc., and its stockholder-carriers failed to file complaints under this section with the Commission, which complaints conceivably could have prevented the alleged interruptions of service in the area serviced by the stockholder carriers of Nebraska Short Line Carriers, Inc. The complaint procedure on the part of the stockholder carriers would have provided a more adequate remedy for their situation.

The Commission has previously ruled in several cases that it can compel a carrier to comply with the Act and perform duties and obligations imposed upon it. *Montgomery Ward and Company v. Santa Fe Trail Transportation Co.*, 46 M. C. C. 212; *Planters Nut & Chocolate Co. v. American Transfer Company*, 31 M. C. C. 719.

Perhaps the best explanation of the situation in this case was characterized by Judge Mercer in the following language:

"The old axiom that 'the hit dog howls' should be made to apply to this case. If Clark and others have a complaint against some or all of the line-haul carriers, they alone should do the howling. Section 212 of the Act provides them the opportunity to assert that complaint before the Commission and invoke a jurisdiction under which the issues could be decided in an appropriate proceeding. At least, until the complaint procedure has been tested, we should not permit the whole pack to come in asserting that some have been hit and claiming a right, on behalf of the pack, to a remedy which the Act was never intended to provide." (R. 269.) (Emphasis supplied.)

CONCLUSION.

The issues involved in this matter are novel and distinct and the questions presented are of substantial and public importance. The issues vitally affect the transportation industry and its employees in this country. The Interstate Commerce Act and the National Labor Relations Act, as amended, and all acts amendatory of both these statutes, are involved in this proceeding.

It is submitted to the Court that the order of the Interstate Commerce Commission to be reviewed by this Court is null and void for the reason that the finding of public convenience and necessity is not supported by the Commission's basic findings of fact. If this order is allowed to stand, it would become a very dangerous precedent in future requests for authority based primarily upon the existence of labor disputes. Although the Commission decided that it was without authority to determine the merits of the labor dispute and to determine the validity of certain collective bargaining clauses, it took the position that it could, nevertheless, find that a breach of duty had been perpetrated as a result of the labor dispute. It is respectfully submitted that the Commission asserted authority beyond that granted by the Interstate Commerce Act.

The aggrieved carriers in this proceeding, appellees herein, were provided with an opportunity to assert any complaint against the other carriers pursuant to Section 212 of the Act. Appellees are contending they are entitled to a remedy which the Act was never intended to provide.

It is, therefore, respectfully submitted that this Court should declare the Commission's order null and void.

Respectfully submitted,

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Omaha 2, Nebraska,

Attorney for General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant.

Dated: August, 1962.

CERTIFICATE OF SERVICE.

I, David D. Weinberg, attorney for General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1962, I served copies of the foregoing Brief of Appellant to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States by mailing a copy in a duly addressed envelope with postage prepaid to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to Robert A. Bicks, Assistant Attorney General; John H. D. Wigger, Attorney, and The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois, Attorneys for Nebraska Short Line Carriers, Inc.

4. On Burlington Truck Lines, Inc., Appellant, by mailing a copy in a duly addressed envelope with postage

prepaid to James A. Gillen and Russell B. James, 547 West Jackson Boulevard, Chicago 6, Illinois, attorneys for said Appellant.

5. On Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Appellants, by mailing a copy in a duly addressed envelope with postage prepaid to David Axelrod, of Axelrod, Goodman & Steiner, 39 South La Salle Street, Chicago 3, Illinois, attorneys for said Appellants.

6. On Santa Fe Trail Transportation Company, Appellant, by mailing a copy in a duly addressed envelope with postage prepaid to Starr Thomas and Roland J. Lehman, 80 East Jackson Boulevard, Chicago 4, Illinois, attorneys for said Appellant.

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SEP 20 1962

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IN THE
Supreme Court of the United States

October Term, 1962.

NO. 27

BURLINGTON TRUCK LINES, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT LINE
CARRIERS, INC., *Appellees*.

NO. 28

GENERAL DRIVERS AND HELPERS UNION, LOCAL
554, Affiliated with The International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of
America, *Appellant*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COM-
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ILLINOIS

**BRIEF OF APPELLEE, NEBRASKA
SHORT LINE CARRIERS, INC.**

Certificate of Service Appended at Page 30

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**BRIEF OF APPELLEE, NEBRASKA
SHORT LINE CARRIERS, INC.**

STATUTES INVOLVED

The sole issue presented to this Court involves only a determination of the power of the Interstate Commerce Commission under the provisions of Section 207 (a) of the

Interstate Commerce Act (49 U. S. C. 307 (a)).*

QUESTION PRESENTED

This appeal from the judgment of a three-judge Federal District Court, dismissing an action brought to set aside an Order of the Interstate Commerce Commission, involves only the question of whether the Commission acted within the scope of its statutory authority in authorizing the operations of an additional motor carrier, in order to alleviate a situation in which a substantial portion of the shipping public in the State of Nebraska had been regularly denied the benefits of adequate motor transportation service due to the repeated and prolonged failure of the existing carriers to render the service collectively authorized by their certificates.

STATEMENT

Appellee, Nebraska Short Line Carriers, Inc., adopts the statement contained in the brief of the Interstate Commerce Commission, and the same is incorporated herein by reference.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission is required, by virtue of Section 207 (a) of the Interstate Commerce Act, to authorize additional motor carrier operations when required by the public convenience and necessity. The extent of this obligation is manifested in the wide range of discretion permitted the Commission by this Court in resolving the particular transportation problems which present themselves to that body. The decision of the Commission on review here is entirely within the bounds of that

* Reprinted in Appendix A

discretion and is wholly consistent with the Commission's obligation to the general public as well as to the transportation industry.

The decision to authorize additional motor carrier operations was made in light of extensive evidence of service failures in the form of delays, misroutings, unnecessary expense, and outright refusals to render service. These service failures, occasioned by the willful failure of existing carriers to live up to their obligations of non-discriminatory public service, continued up to and through the hearings in this matter.

In rendering its decision the Commission considered that not all of the existing carriers failed, at all times, to render the service which they were holding themselves out to offer. On the other hand the Commission also recognized that all existing carriers had, to a greater or lesser extent, failed to meet the reasonable transportation requirements of a large portion of the Nebraska shipping public. In light of these facts the Commission determined that the authorization of additional carrier service was necessary to provide reasonably adequate motor transportation service to the involved area. This was a determination which the Commission was both empowered and required to make and no sufficient basis for its reversal has been shown.

2. As holders of a certificate authorizing service in the public interest, common carriers have an obligation, both at common law and under the Interstate Commerce Act, to provide the service which they hold themselves out to render to all who seek to use it. No sufficient justification for the service failures, so very much in evidence here, has been shown. In such a situation the shipping public is entitled to the services of a carrier pledged to

overcome these service failures and organized for that purpose. Nothing in the Interstate Commerce Act requires that the public exhaust all possible remedies before turning to the certificating provisions to obtain relief. The applicant in this proceeding has met its burden under Section 207 (a) of the Act and is therefore entitled to the relief afforded by that section.

ARGUMENT

I.

Where a substantial portion of the shipping public has regularly been denied the benefit of adequate transportation service due to abandonment by existing carriers of their statutory and common law service obligations, the commission is required, upon request, to authorize additional motor carrier operations.

In virtually every proceeding under Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)), the basis for the application is the fact that the existing carriers, for one reason or another, are not providing the service which the applicant proposes to offer. The inadequacy of the existing service is demonstrated in countless ways, from failure to provide the particular type of service required to lack of the authority necessary to move the commodities in question.

This particular proceeding differs from the normal application only in that here the inadequacy of the existing service which is manifested in the numerous delays, mis-routings, and failure to provide service upon request which are so extensively catalogued in the record (R. 29-51), was the result of a refusal by the existing carriers to maintain normal interline relationships with the non-union short-line carriers in the State of Nebraska along with

direct refusals to serve certain shippers and receivers (R. 104).

As far as the shipping public is concerned, the reasons for inadequate service are immaterial. What is material is the fact that a large segment of the commercial life in the State of Nebraska is absolutely dependent upon adequate motor transportation service, a service which the Commission found to be lacking.

(A) Function of the Commission

The Commission is charged with the duty of authorizing motor carrier operations when required by the present and future public convenience and necessity. Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. 307 (a), which governs this proceeding, provides in part:

“* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the * * * proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.”

Congress has not seen fit to describe the scope of the term, “public convenience and necessity.” In any given proceeding, therefore, it is incumbent upon the Commission to determine whether the issuance of a certificate will be consistent with this statutory test. At the very least the broad wording of the statute gives the Commission the power to consider the particular circumstances of the pending application and, based upon those circumstances, use its expertise to evaluate and solve the particular problem with which it is faced.

In *Interstate Commerce Commission v. Parker*, 326 U. S. 60, 65, this Court affirmed a grant of authority to a rail affiliate. The Court pointed out:

"Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402, (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the findings of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio R. Co. v. United States*, 283 U. S. 35, 42. Cf. *Gray v. Powell*, 314 U. S. 402, 411-12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell v. United States*, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, Cf. *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances * * *"

The function of the Commission in this regard was further defined by this Court in *United States v. Detroit Navigation Co.*, 326 U. S. 236, 241, a case involving the grant of water carrier rights based upon a future need for the service, when it stated:

"* * * The Commission is the guardian of the public interest in determining whether certificates of con-

venience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission v. Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co. v. United States*, 283 U. S. 35, 42; *Alton R. Co. v. United States*, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide."

(B) Evidence of Service Failures

In order to discharge its obligation in this proceeding, the Commission was first required to assess the extent of the public need for the proposed operation. Evidence of such a need, manifested by the inadequacy of the existing service, is clearly illustrated in the testimony of the shippers supporting the application. The first hearing in this proceeding consumed 19 days. 75 witnesses gave 2,886 pages of testimony and introduced 175 exhibits. The bulk of this voluminous record concerns the very item which appellants allege does not exist herein, that is, the inadequacy of the existing service.

In evaluating the evidence supporting the Commission's

decision the lower court noted:

"We point out that this record shows, with abundant evidence, that a deficiency in service to the shipping public of Nebraska continued for over a period of two years because of transportation refusals, disregard of routings, routings by carrier and rail where no joint truck-rail rates were in existence, more expense to shippers, etc., all because of economic and labor pressure on the transportation companies involved." (R. 236-237) (194 F. Supp. 31, 48)

Forty-four shippers witnesses appeared and testified in support of the application. In addition, seven additional shippers witnesses were present in the hearing room available and willing to testify in support of the application, and it was stipulated that had they been called, their testimony, both direct and cross, would have been substantially the same as numerous of the shippers who had previously testified (R. 51). These public shipper witnesses fall into two natural categories, and their testimony can best be analyzed in that manner.

First, there is the testimony of witnesses Ray Ford, Jack Ford, Phil Katzman and Cecil Chaney. They testified in behalf of business concerns in Omaha, Nebraska, who were refused service by the line-haul unionized carriers. The refusal of the line-haul carriers to provide service to these firms resulted in serious hardship and loss of business to the companies involved since their competitors in the same town were provided with door-to-door service by these same line-haul carriers (R. 47-50).

The testimony of the Ford Company shows that it has been in the warehouse business for a great many years at Omaha, Nebraska. As a general warehouse, it handles all types of merchandise. Shipments are received from many

companies who have plants or distribution points on the routes sought by the applicant. These same commodities are warehoused at Ford until orders are received to ship them out to points in the surrounding states (R. 90-91).

Through years of custom and usage, these Ford customers have authorized the Ford Company, as their agent, to arrange for both inbound and outbound transportation service on these commodities (R. 49). By reason of the development and growth of the motor carrier industry in the last few years, an increasing tonnage has been received by Ford via motor carrier. As the record indicates, this inbound tonnage from points involved herein, averages in excess of a million and a half pounds per month. In the latter part of May, 1956, though there was no dispute or altercation whatsoever between the Ford Company and its employees, the Teamsters Union placed pickets about Ford warehouses in Omaha, Nebraska (R. 49). The pickets remained through the time of the hearing in 1957 (R. 91). During this time, the existing carriers failed and refused to provide motor carrier service to or from the Ford warehouses despite repeated requests for service (R. 91). There has been absolutely no violence in connection with this picket line about the Ford warehouses (R. 108). While Ford has diverted most of its inbound tonnage to rail, this has not been satisfactory since certain of its customers prefer to ship by motor carrier and certain accounts have been lost by this company by reason of the fact that no motor common carrier service is available to it (R. 108).

Other witnesses such as Cecil Chaney, owner and operator of one of the largest sheet metal businesses in Omaha, Phil Katzman, general manager of the Omaha Parlor Frame Company and the Chardon Company, furniture manufacturers, and C. Vincent Jones of the Behlen

Manufacturing Company, Columbus, Nebraska, a large steel fabricating company, testified to substantially similar experiences as the Ford Company (R. 107-108).

These businesses must have adequate motor carrier service in order to survive. Their competitors are provided with door-to-door motor carrier service. It is submitted that the shipping needs of these witnesses alone are sufficient to justify the grant of authority to the applicant.

Into the second category fall a great number of witnesses from smaller communities throughout the State of Nebraska. The failure and refusal of the unionized line-haul carriers to interchange traffic at Omaha, Lincoln, or Grand Island, Nebraska, with non-union short-line carriers, had a devastating effect upon the motor carrier service to small Nebraska towns. Nebraska, perhaps more so than any other state, is dependent upon a system of transportation which will provide it with manufactured commodities, articles and supplies necessary to the effective conduct of the agricultural and stock growing industry, which is the primary source of livelihood in the state. In addition it is necessary that a myriad of supplies and commodities used in daily living be transported daily to points in the state.

When the existing carriers refused to interchange traffic with the non-union short-line carriers serving these communities, the free flow of commerce was impeded and almost stopped in certain instances. Badly needed shipments were delayed for several days, even weeks, in transit. Wholly without authorization, appellants and other unionized carriers diverted interstate shipments to rail carriers, with resulting delays, increased costs and serious inconveniences to the consignees involved (R. 107). Specific routing orders to use short-line carriers were entirely

disregarded, making it extremely difficult to receive emergency or rush order shipments. Complaints and demands for service have been made to both the short-line and the line-haul carriers. Shipments of drugs, medicines, polio vaccines and other such items, vital and necessary to the public health and welfare have been delayed in transit, diverted to rail without protection against heat or cold, shipped via irregular or sporadic service given by some cattle hauler in cattle trucks (R. 107) (See generally R. 29-47). The testimony of these shipper witnesses is voluminous and it convincingly proves a substantial public need and demand for the service of the applicant-appellee, so that there will be a reliable and competent motor common carrier, who will conduct proper interchange of freight with short-line non-union carriers in this state.

While they were not public shipper witnesses, the testimony of the various short-line carriers, stockholders of the applicant, is important to a determination of the issue since it demonstrates the basis for the complaints of the shipping public. These stockholders, officers, and directors of the applicant corporation are motor common carriers, and with certain minor exceptions, all of them operate between points in Nebraska, and are in fact "short-line carriers". Nearly all of them operate scheduled service between Omaha, Nebraska, and a variable number of destination points in this state. In the aggregate, they serve well over two hundred Nebraska communities.

All of the stockholders have certificates from the Nebraska State Railway Commission. Approximately half of them hold interstate certificates, authorizing substantially the same kind and type of operations in interstate commerce and the balance have registered their interstate certificates under the second proviso of Sec. 206 (a), of the

Interstate Commerce Act, (49 U. S. S. 306 (a)) thereby enabling them to handle interstate traffic over their respective routes (R. 102). There are several points served by these twelve stockholders which are not served by any other motor common carrier or by any rail carrier (R. 23).

The record is clear, that with the exception of Clark Bros., there has never been any controversy between any of these carriers and their respective employees (R. 29; 104). There has never been a picket line established at or near any of their terminals, except the Omaha terminal of Clark (R. 104). With one exception there has never been any cancellation of any tariff concurrence or any indication to the public that the through rates and through routing published in tariffs, in which both these stockholder carriers and the carrier-appellants and other line-haul unionized carriers participate, would not be honored (R. 29). The shipping public is entitled to rely upon the tariff publications and routings contained therein.

With absolutely no indication to the shipping public or to the short-line carrier involved; in May of 1956, several of the short-line carriers were refused interchange service at Omaha, Nebraska, by the line-haul unionized carriers (R. 103). The only excuse given by the management of the carrier-appellants was that the Teamsters Union had declared such short-line carriers to be on the "unfair list" (R. 103). The non-union short-line carriers continued to provide regular route scheduled service to the points they were authorized to serve, handling almost entirely intrastate traffic. Repeated attempts to restore normal interchange connections with unionized carriers at Omaha, Lincoln, or Grand Island, Nebraska, proved to be of no avail.

(C) Evaluation of Complete Transportation Picture

In spite of the voluminous evidence of the inadequacy of the existing service, appellants challenge the Commission's decision on the ground that the Commission failed to consider the fact that not all the existing carriers refused at all times to provide the service which they were authorized and required to render. It is patent however, that the Commission, in its Report and Order, did consider the overall transportation situation in the State of Nebraska in light of the existing motor carrier service available. For example, the Commission noted:

"At no time has the boycott against the stockholder-carriers been completely effective in that at no time, has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the

other hand. the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all motor traffic moving to and from Nebraska points through Omaha." (R. 104-105) (79 M. C. C. 599; 603).

In addition the Commission recognized and adopted the findings of the hearing examiners which included this statement by Examiner Driscoll in his Report and Recommended Order.

"9.—It should be stated that the attitudes and interchange practices of the truck line carriers were not uniform. Some carriers were more liberal than others and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe Trail accepted almost all traffic offered. *But even those carriers did not maintain the same free and open interchange practices in effect before May 1956.*" (R. 82) (Emphasis supplied.)

The lower court recognized the fact that the Commission had, indeed, considered the available transportation service when it pointed out:

"The plaintiffs argue that since Burlington and Santa Fe generally maintained normal interline relations during the period in question, and since some of the other plaintiff carriers accepted interline traffic at times, the Commission was not warranted in granting a certificate to the applicant. Although the Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) took note of these facts, it nevertheless found that the public convenience and necessity required the operation of the applicant. Therefore, the Commission, in reaching its conclusions, took into consideration such service as those carriers continued to render during the period involved, but after weighing the evidence approved the application." (R. 237) (194 F. Supp. 31, 49)

The district court recognized that consideration of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone to decide. As this Court pointed out in *Virginian Ry. v. United States*, 272 U. S. 658, 663, 665-666:

"* * * To consider the weight of the evidence before the Commission, the soundness of reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province * * *. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it * * *."

The Commission examined an unusual transportation situation in which there was substantial evidence that a large portion of the shipping public was being denied the benefits of adequate motor carrier service. It was required and attempted to alleviate the effect of this service failure by authorizing the operation of an additional common carrier in this area. The appellants now seek to substitute the judgment of this Court for that of the Commission. To do so is to depart from the recognized standards of judicial review of the determinations of administrative bodies as a careful analysis of the reasoning which underlies the appellants' arguments will reveal.

The "recognized standards for the administration of the certificating provisions of the Interstate Commerce Act" which the Commission allegedly ignored are, as recognized by the appellants, set forth in *Pan-American Bus Lines*, 1 M. C. C. 190, 203, as follows:

"The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this

purpose can or will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

The standards established by each of these three tests have been met and surpassed in this proceeding. The public need has been extensively cataloged and reviewed throughout every stage of the proceeding. By their conduct, the existing carriers have demonstrated conclusively that they cannot serve both the shipping public and the union and have capitulated in favor of the latter. Their inability or unwillingness to meet the reasonable demands of the public is apparent. Rather than recognize the duty which their certificates impose, they attempt to evade their responsibilities by urging that the applicant has selected the wrong remedy. Finally, as noted above, where the existing carriers have, to a large extent, voluntarily abandoned a major portion of the shipping public, their protestations of impending harm when another carrier is authorized to attempt to fill the void are not entitled to much weight. The test proposed by the appellants has not been ignored or prostituted by the Commission. Rather it has been applied with absolute fidelity to the obligations imposed upon the Commission by the Interstate Commerce Act, that is to develop a national transportation system adequate to meet the needs of the commerce of the United States. (National Transportation Policy, 49 U. S. C, preceding Sections 1, 301, 901, and 1001).

Where, as here, it is manifest from the Commission's decision that that body was aware of the extent of the service which certain of the appellants continued to provide, a determination that an additional carrier is necessary to satisfy a demonstrated public need is certainly

within both the letter and the spirit of the Commission's authority.

The lower court recognized the fallacy of appellants' argument when it pointed out:

"* * * We also point out here that plaintiff Burlington Truck Lines, Inc., and certain other transportation companies who continued to interchange and accept freight from the Nebraska Carriers, will not be affected by this order. Their business has continued, but because of the fact, either that their transportation facilities were unable to solve the problem when considered in the over-all picture, or because of the refusal of many other transportation companies to render the required service, caused the conditions to exist, is a matter for the Commission in its discretion, to decide. These carriers have interchanged freight from and to Nebraska points during the entire period that applicant has served under its limited temporary authority, and it is reasonable to assume that such interchange will continue in the future. If it does not continue, and even though the resulting competition causes a decrease in revenue to some of the transportation companies, the privilege granted to operate truck lines is in no sense the grant of a monopoly. This is particularly emphasized under Section 207 (b) (49 U. S. C. 307 (b)), which provides in substance that any certificate issued shall not confer any proprietary or property rights in the use of the public highways. There is no immunity against future competition. The record shows that the Commission considered the nature of the service rendered by plaintiff and Santa Fe during the period." (R. 236-237). (194 F. Supp. 31, 48-49).

The validity of appellants' arguments is further emphasized by the fact that, although it is alleged that certain carriers are being "penalized" by the Commission's order, there is no indication anywhere in the record that the ex-

isting carriers, including the appellants, lost any traffic whatsoever during the period of Nebraska Short Line's operation under temporary authority. By the time of the second hearing "rather substantial" operations had been conducted under the temporary authority (R. 84). In spite of this fact not one of the protesting carriers offered any evidence that they had lost traffic to Nebraska Short Line which they would otherwise have enjoyed. The silence of the record in this regard stands in striking contrast to the unsubstantiated "fears" of the protesting carriers that they will be harmed by the institution of operations by the applicant. In any event, the "loss" of traffic which the appellants were steadfastly refusing to move does not appear to be in the nature of a penalty.

(D) Service Failures Justify Grant of Permanent Authority

The appellants' attempt to minimize the situation which prompted the filing of the application by alleging that the service interruptions were "temporary" and that the restoration of service could have been accomplished in other ways.

The Commission considered both of these arguments and, after giving them the consideration which they merit, dismissed them. In its Report the Commission noted that:

"* * * in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term 'present or future public convenience and necessity' in Section 207 of the Act, under which the applications were filed." (R. 118) (79 M. C. C. 599, 613).

This conclusion is fully justified by the record in this

proceeding. The district court, in rejecting a similar argument, pointed out:

"Section 207 of the Interstate Commerce Act, directs the Commission, in determining applications for motor carrier certificates of public convenience and necessity, to consider both the present and future public convenience and necessity. In hearing and determining such applications, the Commission often finds that coincident with the filing of an application, existing motor carriers start to provide or offer to provide better service to more shippers. Obviously, the Commission is not required to give decisive weight to such a belated zeal to serve the public. Similarly, where existing carriers have gone so far as to subordinate their statutory common carrier service obligations to 'hot cargo' clauses, the Commission, in determining the present and future public convenience and necessity, is not required to give controlling weight to a belated cessation of such conduct. It is equally obvious that in determining the public need for service between such major centers as Omaha, on the one hand, and Chicago, St. Louis and Kansas City, the fact that some of the existing carriers provided some of the needed service does not preclude authorization of additional service to insure continuous and sufficient service for all shippers * * * Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service." (R. 246) (194 F. Supp. 31, 54)

There is no question that the public suffered from a lack of adequate motor carrier service and that these service deficiencies continued through the time of the hearing in this proceeding (R. 118). One of the bases upon which the appellants allege that the interline difficulties were of a temporary nature was summarized by Examiner Driscoll in this Report and Recommended Order as follows:

"For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy is to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers." (R. 94)

The decision of the Commission is now being challenged for failing to accept these self-serving declarations as a substitute for the service which these carriers have failed to provide. This tacit admission of the inadequacy of the existing service speaks with great eloquence of the validity of the Commission's determination in this proceeding. It cannot be seriously contended that this "management policy", allegedly put into effect some ten months after the original application was filed, is sufficient to eliminate the economic and commercial distress occasioned by a period of continuing service failure. Even if the "policy" were to have the effect which its instigators allege, the Commission was wholly justified in refusing to believe that this policy would not be withdrawn as soon as it had served its evident purpose. In determining how to accommodate the future public convenience and necessity the Commission can judge best by examining past conduct. In this proceeding such a retrospective view fully justifies the prospective implications of the Commission's decision. Carriers who have so lightly regarded the obligations imposed upon them by their certificates leave the Commission no alternative but to authorize a new carrier, pledged to overcoming just such service failures.

II.

The use of the certificating provisions of Section 207 (a) of the Interstate Commerce Act is proper where the shipping public has been subjected to continuing unexcused service failures at the hands of existing carriers.

Appellants allege that this proceeding cannot be separated from certain labor overtones, but only in the sense that a boycott imposed by the line-haul carriers and a labor union occasioned the service failures which required the filing of the application in question. The issue here is not the validity of the position adopted by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its affiliates. The only issue presented to the Commission was whether the service deficiencies which existed in the state of Nebraska during the period in question justified the authorization of additional common carrier operations in the area. As the Commission, in its Report and Order (79 M. C. C. 599) pointed out:

"We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy: Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board; and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act." (R. 115) (79 M. C. C. 599, 611).

As noted above, the evidence of service failures and their attendant repercussions is substantial. Of course the Commission could not close its eyes to facts that appeared time after time in the record. But to say that the Com-

mission was aware of a service failure, and more particularly, aware of the devastating effects of that failure, is not to say that the Commission has attempted to resolve issues outside its field of special competence.

(A) Obligations of Common Carriers

Whatever the rights and duties of employers under the Labor Act, when those employers are also common carriers under certificates issued by the Interstate Commerce Commission, certain obligations of public service are imposed upon them.

Among these is the obligation to accept and transport all freight offered to them in accordance with the provisions of their published tariffs. *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 129 F. Supp. 475. This duty is almost an absolute one; and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M. C. C. 617, 628; *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry. Co.*, 105 F. Supp. 794, modified 215 F.2d 126.

The extent of this obligation is illustrated by the decision in *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, in which Chief Judge Fee traced the common law history of carriers and their duties and responsibilities in a case growing out of the refusal of carriers to cross picket lines established by the unionized employees of the shipper. The court stated at page 493:

"Thus one of the foundation stones of progress here has been the adoption of the common law, including this absolute obligation placed on common carriers of goods in the public interest. Developed in the darkness of the middle ages in a feudal society, when the cart was the usual means of conveyance over 'traces'

bogged with rain and at times impassable in snow, where the carter was liable to be levied upon by outlaw baron and plundered by fantastic 'road agents,' the status created in the public interest, with its indifference to saint or sinner, official or tradesman, has survived in modern law because of its equality of treatment to all who offered goods for carriage for a specified consideration between specified points in accordance with the holding out of the carrier. While the carrier might limit the holding out quite narrowly as to detail, in the public interest the obligation to serve each upon equal terms without discrimination is vital. So it has remained."

The Court further noted at page 494:

"This basic assumption also controlled the growth of the great carrier system, railroad and motor, in this country. Therefore, the economic power of the United States is based upon these obligations of common carriers. The commerce clause of the constitution was adopted in the light of their importance. The suggestion that these obligations have been abrogated or essentially modified by statute law or policy is unthinkable. In the preservation of these obligations, the public at large—not any class or clique—is vitally concerned. Indeed, the nation will not long survive their destruction."

In delineating the extent of this obligation the Court stated in a subsequent opinion, 128 F. Supp. 520, 521-522:

"Each common carrier, whether trucker or railroad, has a duty at common law and under the Interstate Commerce Act, 49 U. S. C. A. Sec. 1, et seq., to receive, transport, and deliver goods in accordance with its holding out for the engagement of its posted tariff. This duty is almost absolute, since the carrier is excused only when the performance is prevented by the Act of God or the public enemy."

In *Planters Nut and Chocolate Co. v. American Transfer*

Co., 31 M. C. C. 719, the Interstate Commerce Commission had occasion to examine and define the duty of unionized carriers to interchange freight with non-union carriers. In that case, the Commission found that the unionized carriers had been derelict in the performance of their obligations and pointed out:

"Common carriers by motor vehicle are obligated to accept and transport all freight offered to them in accordance with the provisions of their tariffs. The refusal of group-two carriers to accept and transport complainants' freight tendered to them by Rutherford and the group-one carrier was and is unlawful. If the group-two carriers desired to continue to serve the public as common carriers, they should serve all of the public including complainants."

As far as the administration of the Interstate Commerce Act is concerned, the reasons for service failures are immaterial absent an Act of God or the public enemy which justifies such conduct. No such justification is present here. As the Commission pointed out:

"There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible." (R. 116) (79 M. C. C. 599, 612).

To argue that the Commission is attempting to adjudicate a labor dispute when it finds that the existing service is inadequate due to the repeated failures of the existing carriers to meet their service obligations is to argue that the Commission is powerless to remedy demonstrated inadequacies in the national transportation system. The Act is not so narrowly drawn.

In this regard it should be noted that the only stock-

holder carrier which was involved in any type of labor dispute. Clark Bros. Transfer, pursued its remedies before the National Labor Relations Board, and the federal courts without achieving any permanent or long range relief for itself or the public which it serves.

As Examiner Driscoll pointed out in his Report and Recommended Order:

"After some labor negotiations, which need not be recited, four driver employees left the Clark organization at Omaha on September 14, 1955, and picketing of the Clark Omaha Terminal immediately followed. As a result, interchange business with Omaha trunk-line carriers fell to almost nothing. Clark's attorneys soon thereafter took that problem up with the National Labor Relations Board. There were several resulting proceedings before that Board and before Federal Courts. Despite all that, these matters have never been completely settled, at least to the satisfaction of Clark. A contempt citation is still pending before the Court, and the Clark terminal is still being picketed." (R. 88).

At the time of the commencement of the second hearing, April 4, 1957 (R. 78), nearly seventeen months since the first breakdown of interchange relationships, Clark still had not been able to restore normal interlining despite his efforts through the N.L.R.B. (R. 88). The injunctive relief obtained under the Labor Act has not proven sufficient to restore normal interline relationships.

(B) The Existence of Alternative Remedies

In addition to arguing that the difficulties herein may be solved only by a resort to the National Labor Relations Board, the appellants also utilize the labor aspects of this proceeding to advance another novel proposition. It is argued that since the service inadequacies which prompted

the filing of this application were the result of a boycott, the Commission is not free to employ the certificating provisions of Section 207 (a) but should have required the aggrieved public to resort to a complaint proceeding under other sections of the Act.

It is not clear why this proceeding should be treated any differently than any other application brought under Section 207 (a). The Commission has imposed the same burden on the applicant; the unmet needs of the shipping public are at least as equally well demonstrated as in any other proceeding; and the failure of the existing carriers to provide the necessary service is perhaps more fully demonstrated herein than in the average 207 (a) proceeding. In spite of this, the appellants continue to urge that some other remedy is more appropriate in this particular proceeding.

In *Davison Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 219, aff'd per curiam 317 U. S. 587, rehearing denied, 317 U. S. 707, the court reasoned:

"In the case at bar the Commission has found that the services of an additional carrier are required over the routes designated in order that the public may have adequate service. It made no finding that any of the protestant carriers were derelict in their duties, but even if the Commission had made such a finding we would not conclude that the Commission was thereby prohibited from authorizing an additional, and, if need be, a competing carrier to operate in the field. We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service and there is nothing in any of the sections cited or in their legislature history that would require a contrary conclusion. The conception that the public must wait while the Commission exercises its statutory powers fortified by orders of court, to

compel existing carriers to do what they should do is one which does not commend itself to common sense and the public interest."

There is nothing in the nature of this particular proceeding which changes this conclusion. Nothing in the Interstate Commerce Act in any way indicates that a section 204 (c) (49 U. S. C. 304 (c)), proceeding is a pre-requisite to an application under section 207 (a). Further the appellants have failed to establish that the Commission would have the power to relegate the parties to a 204 (c) remedy once, as here, the necessary burden under section 207 (a) had been met. The language of section 207 (a) does not lend itself to such a construction since the only burdens to be met are the fitness of the applicant and the fact that the service is or will be required by the present and future public convenience and necessity. Nowhere does the Act specify that the applicant must also show that some other remedy is not more appropriate.

It is submitted that the Commission would be acting beyond the scope of its authority if it were to force the applicant to elect some other remedy where the burden of showing the need for additional authority had been met. The Commission clearly recognized this fact when it pointed out:

"In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely, the filing of the instant applications under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so

conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen." (R. 117) (79 M. C. C. 599, 613).

Although the salutary effect of a 204 (c) complaint is, at best, problematical as indicated by Clark's experience with injunctive relief, the fact remains that the tests under section 207 (a) have been met and the Commission was not only justified but required to authorize the proposed operations. The Commission must be left free to determine, under all of the circumstances, which of the several available remedies will most adequately serve the public interest. Even though the evidence in this proceeding might also be sufficient to warrant relief under some other section of the act, it is submitted that the granting of the application in question will best serve the long-range public interest. The relationship of carrier and shipper is not likely to be satisfactory where one of the parties is operating under the shadow of a court injunction.

Unless the common carriers of this country are to be free to abandon their obligations to the shipping public according to the particular exigencies of the moment the Commission must be able to utilize all of the weapons available to it to insure an adequate nationwide transportation system. If some carriers are damaged by the permanent diversion of the traffic which they voluntarily abandoned, this damage is imminently justifiable in view

of hardships which the conduct of these same carriers visited on the shipping public of the state of Nebraska.

The Commission recognized the existence of the various avenues which the shipping public could follow in attempting to secure the type of transportation service to which they are entitled. With this in mind it was determined that the authorization of an additional carrier would best serve the public interest and was imminently justifiable on the record herein. In arriving at this conclusion the Commission discharged its obligation under the Interstate Commerce Act to weigh the competing factors and, by application of its specialized knowledge of the transportation industry, to determine how the public convenience and necessity can best be served. No basis exists for overturning this determination.

CONCLUSION

The position adopted by the Commission has ample justification both in the record herein and in the principles of law which underlie its decision. The voluntary abrogation of their duties as common carriers by the appellants merely highlights the propriety of the Commission's determination. The elimination of these service failures is the responsibility of the Commission and its determination that an additional carrier should be authorized is within the scope both of its powers and its obligation to the public. It is therefore submitted that the decision of the United States District Court for the Southern District of Illinois should be affirmed.

Respectfully submitted.

J. MAX HARDING,

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Short Line Carriers, Inc.*

Proof of Service

1. J. Max Harding, attorney for Nebraska Short Line Carriers, Inc., hereby certify that on the 19 day of September, 1962, I served copies of the foregoing document on all parties of record, as follows:

1. On Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., Appellants, by mailing copies in duly addressed envelopes with air mail postage prepaid to their respective attorneys of record as follows:

To David Axelrod, Jack Goodman, Carl L. Steiner and Arnold L. Burke, 39 South LaSalle Street, Chicago 3, Illinois; to James Gillen and Russell B. James, 547 West Jackson Boulevard, Chicago 6, Illinois; and to Starr Thomas and Roland J. Lehman, 80 East Jackson Boulevard, Chicago 4, Illinois.

2. On General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, as follows: To David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

3. On the United States of America, Appellee, by mailing copies in duly addressed envelopes with air mail postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois; to Robert A.

Bicks, Assistant Attorney General, to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

4. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel and I. K. Hay, Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

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APPENDIX

Section 207 (a), Interstate Commerce Act, 49 U.S. C. 307 (a)

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Nos. 27 and 28

FILED

SEP 24 1962

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

BURLINGTON TRUCK LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION

GENERAL DRIVERS AND HELPERS, LOCAL 554, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE
COMMISSION

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OPINIONS BELOW

The opinion of the district court (R. 209-255) is reported at 194 F. Supp. 31. The report of the Interstate Commerce Commission (R. 99-120) is reported at 79 M.C.C. 599.

JURISDICTION

The judgment of the district court dismissing the complaint was entered on April 27, 1961 (R. 209), and the notices of appeal in Nos. 27 and 28 were filed on June 23, 1961 (R. 274-277) and June 22, 1961 (R. 270-273), respectively. Probable jurisdiction was noted on January 8, 1962 (R. 281; 368 U.S. 951). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1, and Sections 204(c), 207(a) and 212(a) of the Interstate Commerce Act, 49 Stat. 546, 551, 555, as amended, 49 U.S.C. 304(a), 307(a) and 312(a), are reproduced in the Appendix, pp. 37-39, *infra*.

QUESTIONS PRESENTED

1. Whether the Commission's grant of a certificate was warranted by the standards of public convenience and necessity in Section 207(a) of the Interstate Commerce Act.
2. Whether the authorization of additional motor carrier service to replace inadequate interchange service, rather than an order requiring the existing carriers to resume interchanging, was an appropriate exercise of the Commission's power to make a choice of remedies under the Interstate Commerce Act.
3. Whether the fact that the inadequacy of service stemmed from labor difficulties deprived the Interstate Commerce Commission of authority to meet the transportation needs thereby generated.

STATEMENT

These cases are here on direct appeal from the final judgment of a three-judge district court, sustaining a report and order of the Interstate Commerce Commission. The Commission's order (R. 120) granted a certificate of public convenience and necessity to Nebraska Short Line Carriers, Inc. ("Short Line"), authorizing it to perform interstate motor carrier operations as a common carrier of general commodities between Omaha and Chicago (serving no intermediate points) and between Omaha and St. Louis (serving the intermediate point of Kansas City, Missouri), but restricted to traffic originating at or destined to points in Nebraska (R. 118-119).

Short Line is a Nebraska corporation owned by twelve relatively small motor carriers (hereinafter, the "stockholder-carriers") operating in interstate commerce primarily within the State of Nebraska (R. 84). All of these stockholder-carriers transport general freight over regular routes from eastern and central Nebraska to Omaha and other gateway points at which, prior to the breakdown in services which occasioned these proceedings, they interchanged traffic with as many as 22 larger motor carriers for movement to and from points beyond Nebraska (R. 22). The various tariffs filed by the stockholder-carriers and the larger interstate carriers established through interline rates and provided for interchanging traffic at the gateways. The stockholder-carriers serve, in addition to other points, a number of small Nebraska towns and villages which have no regular motor carrier service except that of one of the stockholder-

carriers and no daily rail service, so that they are dependent upon the stockholder-carriers for any regularly scheduled common-carrier service as well as for pick-up and delivery and other services.¹

For several years, the stockholder-carriers had resisted attempts on the part of the Teamsters Union² to organize their employees. Despite the general disinterest of the employees in seeking union membership, the union determined that organizational efforts should be concentrated upon the management of the stockholder-carriers in order to attempt to get their employees into the union by agreement. Failing in the attempt, the union thereupon decided to enforce its demands by bringing economic pressure to bear on the stockholder-carriers, declaring certain of the stockholder-carriers "unfair" and instituting a secondary boycott against their traffic through the larger unionized carriers on which the stockholder-carriers were dependent for the handling of interline traffic moving to and from points beyond Nebraska. The boycott was imposed pursuant to so-called "protection of rights" or "hot cargo" clauses contained in the labor contracts between the larger carriers and affiliates of the Teamsters Union (R. 102-103).³

¹ See pp. 11-12, *infra*.

² International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an affiliate of which is the appellant in No. 28.

³ These clauses in relevant part provide that it shall not be a cause for discharge if an employee of the connecting carrier refuses to handle "unfair" goods, and that the Union and its members reserve the right to refuse to handle goods from or to any firm or truck which is involved in any controversy with the Union (R. 103). Cf. *Local 1976, Carpenters' Union v. National Labor Relations Board*, 357 U.S. 93, 95, 97.

In early May of 1956, certain of the stockholder-carriers began to experience widespread difficulty in effecting normal interchange with the larger carriers (R. 103).⁴ These difficulties, encountered at Omaha and at other interchange points, consisted of the refusal of many of the larger carriers (1) promptly to accept shipments tendered to them by the stockholder-carriers for points outside Nebraska, (2) to deliver to the stockholder-carriers inbound traffic which had been directed by shippers to be routed over the lines of a stockholder-carrier, and (3) to deliver inbound traffic which normally would have been handled by the stockholder-carriers at Omaha and other connecting points for delivery to interior points in Nebraska (R. 104). This caused shippers and consignees to experience substantial delays, inconvenience and unforeseen expense in the movement of freight to and from interior Nebraska points (R. 105).⁵ A few of the interlining carriers (notably appellants Burlington Truck Lines, Inc., and Sante Fe Trail Transportation Company) continued to accept interline traffic from the stockholder-carriers "more or less regularly" and "generally" maintained normal interline relationships with them (R. 104); however, interchange practices with even these carriers were less satisfactory than they had been prior to May 1956 (R. 82, 83).

⁴ Deliveries of interchange traffic ceased generally to one of the stockholder-carriers on or about September 17, 1955, when a picket line was placed at its Omaha terminal by the Teamsters Union (R. 26-27, 104). None of the other stockholder-carriers has had any dispute with its employees, and no picket lines were established against them (R. 29, 104).

⁵ The facts relating to the actual breakdown of service are set forth in greater detail at pp. 12-15, 17-19, *infra*.

The stockholder-carriers organized Short Line on June 14, 1956. By application filed on June 22, 1956, Docket No. MC-116067, Short Line sought authority to transport general commodities in interstate commerce on a regularly scheduled basis from several major Nebraska and Iowa points, including Des Moines, Omaha, Lincoln, and Council Bluffs, to Minneapolis, Minnesota, and St. Joseph and St. Louis, Missouri, as well as to Chicago and Denver, serving all intermediate points (R. 119-120). In a separate application filed January 10, 1957, Docket No. MC-116067 (Sub-No. 2), Short Line sought authority to transport general commodities between Omaha and points in 32 different states on an irregular basis (R. 101). The two applications were heard by different hearing examiners. Each conducted an extensive hearing at which a number of shippers offered testimony in favor of the application at issue, and a number of motor carriers (including appellant carriers) and railroads offered testimony in opposition. Although each examiner recognized that the boycott had caused marked service inadequacies, they both (in separate reports, R. 17-76, R. 77-98) recommended against the grant of a certificate to Short Line.

The two proceedings were consolidated for decision by the Commission, which adopted the factual findings in the two examiners' reports (R. 107). On the basis of these facts the Commission found that the union-induced boycott of the stockholder-carriers by the large interstate carriers had resulted in "a substantial disruption in motor service to a large portion of the Nebraska shipping public" and "serious inadequacies

in the service available to a large section of the public" (R. 116, 117). The Commission concluded that, while Short Line had not established a need for the service proposed in its application for irregular authority (Docket No. MC-116067 (Sub-No. 2)) (R. 115), the grant of a limited portion of its application for regular authority was required by "the present and future public convenience and necessity" (R. 118). Accordingly, the Commission awarded Short Line authority to operate motor service between Omaha, on the one hand, and Chicago, St. Louis and Kansas City, on the other, restricted to traffic originating at or destined to points in Nebraska (R. 118-119).⁶

Appellant Burlington Truck filed a complaint in a United States district court seeking to have the Commission's order enjoined and set aside; the other appellants intervened in that proceeding. The three-judge district court, with one judge dissenting (R. 255), sustained the Commission's order (R. 209). It held that the order was "supported by substantial evidence that the service of existing carriers, under the circumstances here involved, was inadequate" and found the evidence to establish "that the competitive service as here granted is in the public interest" (R. 242).

⁶Service had been inaugurated under temporary authority granted by the Commission by order of December 4, 1956 (R. 21). As of the date of the decision, the carrier had inaugurated one round-trip schedule daily between Omaha and Chicago and one between Omaha and Kansas City. Service was also being offered at the time of the decision between Omaha and St. Louis on a call and demand basis. All vehicles and terminal facilities were leased (R. 102).

SUMMARY OF ARGUMENT

I

The record in this case contains extensive testimony by users of motor carrier service in small Nebraska towns which are largely, if not wholly, dependent upon the stockholder-carriers for regular common-carrier transportation service. They testified that the disruption of service occasioned by the interchanging carriers' boycott of the stockholder-carriers had caused them substantial additional expense, delays and inconvenience. On the basis of this evidence the Commission found that there were serious inadequacies in the service available to a large segment of the Nebraska shipping public, and that the present and future public convenience and necessity required the authorization of a limited new service to correct these inadequacies. In view of the wide scope of the Commission's discretion in determining the public convenience and necessity, and of the Commission's past practice of granting new certificate authority in analogous situations, this conclusion was reasonable and sound.

There was an adequate basis in the record for the Commission to reject appellants' contention that the disruption of service was not sufficiently "complete" because some of the interstate carriers continued to do some interchanging with the stockholder-carriers. The evidence showed, and the Commission found, that such interchanging as these carriers were providing was insufficient to restore adequate interline service.

The Commission acted reasonably in declining to accept the contention that, because the labor problem giving rise to the service disruption was "temporary,"

there was no basis for a grant of permanent certificate authority to correct it. The primary basis for this contention was a "new policy," adopted by several of the interstate carriers, that they would attempt to achieve normal interchanging. That this policy was highly qualified and was adopted on the eve of the hearings herein were alone sufficient to warrant the Commission's refusal to give it decisive weight. Moreover, the labor difficulties here were of long standing, and there was no reliable basis for concluding that they would soon be settled. Accordingly, the Commission was justified in granting a permanent certificate to correct the resulting inadequacies of service.

II

The Commission properly exercised its discretion in meeting the transportation problem involved by authorizing additional motor carrier service rather than by issuing a cease and desist order requiring the existing carriers to interchange with the stockholder-carriers in accordance with their tariffs. The Commission had ample grounds for refusing to assume that such an order would eliminate the service inadequacy, in view of the long-standing and continuing character of the labor difficulties from which it arose. Moreover, the Commission's inability to compel the carriers to enter into and maintain tariff agreements for interchanging would sharply limit the efficacy of such an order. The Commission has a wide discretion in determining which of the remedies available to it will best satisfy the transporta-

tion needs at issue. It exercised that discretion carefully and reasonably in this case:

III

The Commission's decision does not impinge upon the jurisdiction of the National Labor Relations Board, as appellant union contends. This Court held in *Local 1976, Carpenters' Union v. National Labor Relations Board*, 357 U.S. 93, that the Board has no concern with common carriers' performance of their service obligations, just as the Commission has no concern with their labor agreements. Here the Commission carefully avoided adjudicating the legality or enforceability of the "hot cargo" clauses that gave rise to the service inadequacies involved in this case. It simply dealt with the transportation problem at issue in a manner consistent with its responsibilities under the Interstate Commerce Act and the National Transportation Policy.

ARGUMENT

I

THE COMMISSION'S GRANT OF A CERTIFICATE WAS WARRANTED BY THE STANDARDS OF PUBLIC CONVENIENCE AND NECESSITY IN SECTION 207(a) OF THE INTERSTATE COMMERCE ACT

Under Section 207(a) of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. 307(a), the Commission is authorized and required to issue a certificate for motor common carrier operation when the service proposed "is or will be required by the present or future public convenience and necessity"; and under the National Transportation Policy (49 U.S.C. pre-

ceeding § 1) this authority is to be exercised to promote "adequate, economical, and efficient service." In the following pages, we show that the record contains substantial evidence from which the Commission could conclude that adequate, economical and efficient motor carrier service was not available to a substantial group of shippers and consignees (see pp. 11-16, *infra*), and that this inadequacy of service was not of such a minor or temporary character as to warrant ignoring it (see pp. 16-24, *infra*). On such a record, we submit, it was plainly within the Commission's wide discretion in determining the public convenience and necessity to grant Short Line, the applicant herein, the limited certificate at issue.

It should be observed at the outset that the Commission attacked the transportation problem involved here with a due regard for the limitations on its own jurisdiction and expertise. Although the service inadequacy at issue stemmed ultimately from labor difficulties, the Commission consciously refrained from passing on the merits of those difficulties, restricting its consideration to the task of restoring adequate transportation service. So restricted, its task was not substantially different from what it would have been had the service inadequacy stemmed from carrier inefficiency or financial condition. The simple fact was that a gap in service existed, and it was the Commission's duty to fill it.

1. At the two hearings on Short Line's applications, extensive testimony was presented from many persons operating businesses in fourteen cities and towns in

eastern Nebraska served by the stockholder-carriers (R. 29, 89-94). In a number of these communities, the stockholder-carrier provided the only regularly scheduled motor carrier service (R. 25, 26, 30, 34, 36, 37), and many of them did not receive daily rail service (R. 30, 32, 33, 36, 38).⁷ These users required fast, frequent, dependable transportation service for a variety of reasons; some of them, for example, were dealers in perishable commodities (R. 30, 32, 36, 42), some were automotive or farm implement dealers requiring emergency parts shipments (R. 31, 35, 38, 39), some were retailers who maintain low inventories (R. 32, 33, 38, 40, 41, 45) (see also R. 35, 46).

Prior to the spring of 1956, these merchants employed the services of stockholder-carriers, usually on an interchange basis with one of the larger interstate carriers, and found this service satisfactory. When the boycott against the stockholder-carriers began to develop, shipments began arriving by other means, often in violation of these merchants' shipping instructions (R. 30, 31, 33, 36, 40, 43, 44). Frequently these shipments, although dispatched by motor carrier, would arrive by rail, which the merchants found unsatisfactory because of added expense (R. 30, 31, 32, 37, 92-93), delays (R. 30, 31, 32, 34, 37, 42, 45, 92, 93), and inconvenience (R. 30, 31, 32). In other instances shipments would arrive by motor carriers (other than stockholder-carriers) whose service was unsatisfactory because it was irregular or infrequent

⁷ Although some of the larger carriers were authorized to serve some of these points, they did not have sufficient freight to justify regular operations and, under normal conditions, interchanged with connecting lines (R. 53, 57).

(R. 34, 36, 44), was inconveniently timed (R. 34, 39), involved delays (R. 35, 36, 39, 43, 45) or added expense (R. 36), or failed to provide needed special service (R. 42, 46). In some cases, the merchants were forced to go to other towns to pick up shipments (R. 35, 38). In others, they had to switch to all-rail shipment, which they found too slow (R. 32, 37, 38, 45).^{*}

Accurately summarizing this record evidence, the Commission found (R. 107):

As a result of the breakdown of interchange arrangements at Omaha, shippers at interior Nebraska points have experienced delays in the movement of their outbound shipments to destination, and consignees at such points have experienced delays, inconveniences and unforeseen expense in connection with their inbound shipments attributable to the failure of the originating carriers serving Omaha to honor their routing instructions or to route their unronted shipments in the most logical manner, namely, over the lines of the stockholder-carriers providing daily scheduled service to their communities. When motor shipments are diverted to rail, the consignees suffer not only delays in delivery but also the additional expense of having to pay a

^{*} Testimony was also received from four firms that had themselves experienced labor difficulties involving picket lines (R. 47-50, 89-92). The employees of unionized motor carriers had refused to cross the picket lines, thus denying them pick-up and delivery service (R. 47, 48, 49, 90, 91, 92), and forcing them to pick up their own deliveries (R. 47), hire a local cartage firm at added expense (R. 48), employ rail service (R. 91), or experience substantial losses of business (R. 49-50, 91).

combination of rail and motor local rates since there are no joint motor-rail rates published on such traffic through Omaha.

Appellants do not appear to question these findings, based as they are on undisputed evidence.

We submit that this undisputed record of service inadequacy was clearly sufficient to warrant the Commission's conclusion that authorization of a new service was warranted. It is settled by many decisions of this Court that the Commission possesses a broad discretion to determine the public convenience and necessity.⁹ In *Interstate Commerce Commission v. Parker Motor Freight*, 326 U.S. 60, 65, this Court succinctly described the scope of the Commission's authority:

The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. * * * This, of course, gives administrative discretion to the Commission, * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.

⁹ The corollary to this doctrine is the well recognized limitation upon the scope of judicial review of administrative action. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Alley Barge Line Co. v. United States*, 292 U.S. 282, 286-287. A judicial tribunal "cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

More recently, the Court observed in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88, that "the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service."

The Commission has often granted new certificate authority in analogous instances of service inadequacy. Particularly relevant here is the fact that the Commission has consistently certificated new through services where a clear showing was made of inadequacy in existing joint-line service. See, e.g., *Penn Ohio New York Exp. Corp. Extension-New York*, 27 M.C.C. 269, 273 (1940); *Malone Freight Lines, Inc., Extension-Textiles*, 61 M.C.C. 501 (1953); *Dallas & Mavis Forwarding Co., Extension-Montana*, 64 M.C.C. 511, 514 (1955); *Braswell Extension-California*, 68 M.C.C. 664, 665-666 (1956); *Kenosha Auto Transport Corp. Extension-Kenosha, Wis.*, 72 M.C.C. 289, 291 (1957).

Moreover, there is a clear warrant in the decisions of this Court for the conclusion that something less than a total absence of service will justify the authorization of a new service; thus, in the *Schaffer Transportation* case, *supra*, shippers' testimony as to the inadequacies of existing common carrier service in relation to their shipping needs was held decisive in the absence of a "finding that the authorization of the proposed service would impair the sound operation of the carriers already certificated" (355 U.S.

at 86, 92).¹⁰ Cf. *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81. In *American Trucking Ass'ns, Inc. v. United States*, 355 U.S. 141, the Court, in sustaining the Commission's grant of a motor carrier certificate, relied upon "evidence of a serious need for less-than-truckload peddle service" at small towns in Iowa and the fact that "other carriers frequently failed to handle such traffic, and gave service inferior to that of [applicant] when they did operate" (355 U.S. at 153); the Court also sustained the authorization of a new truckload operation between major points to ensure an economically feasible peddle operation (355 U.S. at 153-54). The Commission's efforts there to maintain adequate service at small Iowa towns is in many respects similar to its efforts in this case to ensure adequate service to and from the small Nebraska communities involved here.

2. Appellants contend, however, not only that the disruption of through service on which this certification was based was not so "complete" as to warrant the award of new authority, but also that the labor difficulties which gave rise to it were essentially of a temporary character. There is, we submit, a wholly adequate basis in the record for the Commission to have concluded, first, that the disruption was sufficiently widespread and injurious to justify the au-

¹⁰ It is noteworthy that, in the instant case, neither the examiners nor the Commission was able to find that any of the protesting carriers would suffer substantial adverse effects from the grant of a limited certificate to Short Line. Both examiners did make findings (adopted by the Commission, R. 167) that the small stockholder-carriers suffered substantial losses of business as a result of the service disruption (R. 22-26, 83).

thorization of new and additional service and, second, that the prospects for a complete and permanent solution to the labor difficulties out of which it arose were too speculative to allow the Commission to take them for granted.

(a) The basis for appellants' argument that the disruption of service was not "complete" is that (as the Commission found) a few of the larger carriers (notably appellants Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries) "appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them" (R. 104). However, that finding must be read in the light of a more specific finding adopted by the Commission (R. 82; R. 107) that

even those carriers [*i.e.*, Burlington Truck and Santa Fe Trail] did not maintain the same free and open interchange practices in effect before May 1956. In many or most instances, the interchanged traffic had to be handled at the terminal by officials or supervisory personnel, because the employees normally handling such traffic would not touch it.

Moreover, specific instances of rejection of shipments by both Burlington Truck and Santa Fe Trail appear in the record (R. 179, 182-183, 185, 191-193; R. 179, 181, 184-185, 186, 198-199), as well as many instances of Burlington Truck's ignoring routing instructions (R. 195, 197, 202-203, 204-205, 206). Significantly, neither the examiners nor the Commission found that

Burlington Truck and Santa Fe Trail provided an adequate substitute service.

The Commission was, we submit, entitled to conclude that reliance on a handful of interlining carriers with necessarily limited authority and capabilities, in place of the numerous carriers that had interchanged with the stockholder-carriers prior to the service disruption, would not be "adequate" service to shippers and consignees.¹¹ It also had good reason to consider that the necessity for these few carriers to rely on their supervisory personnel in order to provide the interchange service raised serious questions as to whether that service was "economical" or "efficient." It was justified in finding, as it did (R. 104-105) that, despite such service as Burlington Truck and Santa Fe Trail continued to render, (1) as to outbound freight, "the uncertainty of the situation has resulted in considerable harassment to the [stockholder-]carriers and substantial delays in the movement of freight," and (2) as to inbound freight, "shipper routing instructions have been generally ignored" and traffic "normally turned over to the stockholder-carriers for ultimate delivery to points on their lines" has been routed otherwise, "with resultant delays in delivery, inconvenience, and added expense to shippers." In short, as the Commission

¹¹ For example, Burlington Truck was the only one of the nine protestant carriers operating between Omaha and Chicago that maintained continued interchange service (R. 109). And Santa Fe Trail serves only one of the three non-Nebraska points (Kansas City, *ibid.*) to and from which the Commission found that Omaha and interior Nebraska points were not being adequately served.

found, whatever interchanging these carriers were providing had proved insufficient to eliminate "serious inadequacies in the service available to a large section of the public" (R. 117).

(b) The apparent basis for appellants' contention that the service disruption was transitory, because the labor problems from which it stemmed were temporary, is the fact that on April 3, the eve of the evidentiary hearing on Short Line's second application that began on April 4, some of the large interlining carriers announced the adoption of a "new policy * * * to the effect that serious and persistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers" (R. 94). We believe that, for a number of reasons, it was within the Commission's sound discretion to conclude that the likelihood of a permanent resolution of the labor problems causing the service disruption was sufficiently questionable that the authorization of a reliable new service was required by the present and future public convenience and necessity.

First, the policy (as reflected in the undisputed findings of the second examiner) was highly qualified. Apparently it was adopted by only a limited number of the numerous carriers that had interlined with the eastern Nebraska carriers prior to the disruption of service. (R. 94-95). It was phrased only in terms of "attempts" to achieve free and normal interchanging (R. 94), providing no assurance that success was to be anticipated. Indeed, these carriers admitted that, to the extent that any further labor problems involved picket lines (and, as we have noted, some

of the situations that gave rise to the disruption of service did involve picket lines, see notes 4, 8, pp. 5, 13, *supra*), "there might still be difficulties in interchanging traffic in the usual and normal methods of interchanging" (R. 94-95). In sum, the "policy" as stated scarcely offered a very substantial basis for optimism that the persistent difficulties which had caused the service disruption would be eliminated.

Second, the Commission was not required to rely upon a "new policy" adopted the day before the commencement of hearings at which the impact of the large carriers' previous policy upon service to the public was to be considered. As the court below observed, "the Commission is not required to give decisive weight to such a belated zeal to serve the public" (R. 246). See also *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498; *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 220 (C.A. 7), affirmed, 324 U.S. 726.

Most important in this connection is the factual context in which the Commission had to consider the matter. The widespread service deficiencies giving rise to a public need for new service had persisted for eleven months (from May of 1956) as of the opening of the second hearing in April 1957. The labor problem from which these service deficiencies stemmed had been long-continuing, and there was no evidence before the Commission that it had been solved or that there was any reasonable prospect of its early resolution (other than an announced "new policy" of several carriers to "attempt" to circumvent it). If the

Commission had been confronted, for example, with a situation in which a carrier that had failed to perform its service obligations for a year because of insufficient equipment represented to the Commission that it would "attempt" to obtain the equipment soon, there would be no question of the Commission's authority—if not its duty—to grant authority to another carrier to fill the gap in service. So here, the Commission, having allowed fully adequate time for the labor problem to be resolved and knowing that there still was no substantial promise of a prompt and lasting solution, was entirely justified in filling the service gap that had been created.

That the Commission takes a consistent and rational approach to this problem is evident from a number of its past decisions in which it has declined to allow genuinely temporary labor difficulties that had been definitely resolved to be the basis for authorizing additional service. Thus, in *Galveston Truck Line Corp. Extension—Oklahoma*, 79 M.C.C. 619, 620-622 (1959), the interruption in interchange service had lasted but two months, and service had been resumed six months before Galveston filed its application. In *Jack Hudson, Inc., Contract Carrier Application*, 54 M.C.C. 681 (1952), the application was urged upon the ground that the protesting motor carrier had suspended operations temporarily because of labor difficulties two years prior to the hearing; the Commission denied the application, stating that "the mere possibility of a future interruption in public transportation as a result of labor difficulties" would not be a valid reason for granting it (54 M.C.C. at 684). Similarly, in *Mason*

& *Dixon Tank Lines, Inc., Extension—Chemicals*, 83 M.C.C. 159 (1960), the Atomic Energy Commission, as a shipper, desired additional service to insure against any interruption in service due to labor difficulties; however, the AEC had not experienced any interruption in service, and the Commission denied the application, citing the *Jack Hudson* case, *supra*.

Here, in contrast, the Commission observed that the eleven-month-old labor difficulties out of which the disruption in service had arisen "were of more recent origin and were continuing to be experienced up to and including the time of the hearing" (R. 118). This finding was based on undisputed evidence, and it amply supported the Commission's conclusion that it should take steps to deal with the pronounced service inadequacies which prevailed, rather than indulge in the dubious speculation that letting "nature take its course" would lead to a restoration of adequate service.

Appellant carriers also suggest that the Commission should have recognized that, as a result of this Court's decision in *Local 1976, Carpenters' Union v. National Labor Relations Board*, 357 U.S. 93, "the resistance of the carriers [to the invocation of "hot cargo" clauses] would increase rather than diminish and that the interchange difficulties themselves in all likelihood would be completely overcome" (Br. in No. 27, p. 25; see also *id.* at pp. 15-16). However, not only would such a conclusion involve a considerable degree of speculation but, by calling for a judgment upon the impact of an important labor law decision on the labor practices of the carriers, it would have injected the Commission into the delicate area of la-

bor relations that it so persistently sought to avoid (see R. 115-116). The wisdom of the Commission's restraint in this regard has been dramatically demonstrated with respect to this very point that the appellant carriers raise: while they seem to contend that the *Carpenters' Union* case, together with the 1959 amendments to Section 8 of the National Labor Relations Act,¹² spell the end of "hot cargo" clauses, the appellant union disagrees; it argues that under the *Carpenters' Union* case and the 1959 amendment "a protection of rights clause (hot cargo) would not necessarily violate" the Labor Act (Br. in No. 28, p. 11; see also *id.* at pp. 11-12). The Commission does not doubt its lack of competence to resolve that controversy.

There was, we submit, a substantial basis in the record as a whole for the Commission's conclusions, not only that there had been "substantial disruption in motor service to a large portion of the Nebraska shipping public" and "serious inadequacies in the service available to a large section of the public" (R. 116, 117), but that such limited interline service as was available did not correct these inadequacies (R. 104-105) and that there was no dependable prospect of a permanent solution to the labor problem that had given rise to them (R. 118). These conclusions in turn adequately support the Commission's ultimate finding that the "present and future public convenience and necessity" required the award of limited new

¹² 49 Stat. 452, as amended by 73 Stat. 543, 29 U.S.C. Supp. III 158(e).

authority to Short Line (*ibid.*). Accordingly, the court below properly held (R. 242)

that the order of the Commission is supported by substantial evidence that the service of existing carriers, under the circumstances here involved, was inadequate, and that the proof in the record shows that the competitive service as here granted is in the public interest.

II

IT WAS AN APPROPRIATE EXERCISE OF THE COMMISSION'S CHOICE OF REMEDIES TO AUTHORIZE ADDITIONAL SERVICE RATHER THAN TO ORDER THE APPELLANT CARRIERS TO RESUME INTERCHANGE

The appellant carriers contend that the Commission's award of a certificate to Short Line "was also arbitrary and contrary to the standards of the statute because it disregarded other more appropriate remedies provided by the Interstate Commerce Act itself, particularly Section 204(c)" (Br. in No. 27, pp. 21-27). Apparently they do not contend that the Commission may not ever cope with service deficiencies by authorizing additional service; such a contention would fly in the face of the many Commission decisions authorizing additional service upon a showing of inadequacy in the existing interchange service, although existing carriers had ample authority to provide the needed service (see p. 15, *supra*). Rather they contend that in this case the Commission did not make a "rational choice" of remedies (*id.*, at p. 22). Here, too, the justification of the Commission's action is found in the circumstances.

Section 204(c) of the Interstate Commerce Act, 49 Stat. 546, 49 U.S.C. 304(c), authorizes the Commission, after notice and hearing, to issue an order to compel a motor carrier to comply with any provision of the Act or with any requirement established pursuant to the Act.¹³ Without doubt, the Commission could have instituted an appropriate proceeding with a view to issuing an order under Section 204(c) directing the appellant carriers to cease and desist from the interruption of interchange with the stockholder-carriers pursuant to their filed tariffs. Indeed, it issued such an order in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957).¹⁴

However, it was reasonable for the Commission to conclude that such an order would be less effective in this case than in the *Galveston* case. As we have noted (see p. 21 and n. 14, *supra*), the labor difficulties giving rise to the disruption of service in that case had ceased to exist; the Commission could expect

¹³ Appellant union suggests Section 212 of the Act, 49 Stat. 555, as amended, 49 U.S.C. 312, as an alternative remedy (Br. in No. 28, pp. 18-19). That section provides that the Commission may suspend, change or revoke a carrier's certificate "for willful failure to comply with" its certificate obligations or Commission orders. While this section might properly be invoked to enforce a Section 204(c) order, it seems questionable whether, in the absence of such an order, the requisite element of wilfulness was present. In any event, we submit that the same considerations that justified the Commission's preference for employing Section 207 rather than Section 204(c) (see pp. 25-28, *infra*) apply with equal force to Section 212.

¹⁴ That case involved the same labor controversy as that involved in the *Galveston Extension* case, cited at p. 21, *supra*, and in the Commission's decision at R. 118.

that they would not stand in the way of a resumption or maintenance of service. Here, the labor difficulties "were continuing to be experienced up to and including the time of the hearing" (R. 118). The Commission was entitled to consider the possibility, for example, that, if it ordered the existing interstate carriers to interchange, attempted compliance might so aggravate their labor difficulties as to cause a complete cessation of operations (see Jurisdictional Statement in No. 27 (then No. 336, Oct. Term 1961), p. 10). Moreover, the Commission had before it the fact that an injunction obtained by the National Labor Relations Board against the Teamsters on behalf of one of the stockholder-carriers had been unavailing to restore adequate interchange service (R. 27-28); even after it had been issued, "traffic was accepted in some instances and refused at other times," resulting in delays in which it sometimes took the stockholder-carrier "at least two days to dispose of shipments" (R. 28). The Commission was not required to assume that a cease and desist order issued by it would be substantially more effective than the court's injunction in remedying the service inadequacies within a reasonable time. It was entitled to follow the course best calculated to bring about a restoration of adequate service: the certification of a new carrier to provide that service.

Furthermore, the efficacy of a Section 204(e) order is severely limited by the fact that under Section 216(c) of the Act, 49 Stat. 558, 49 U.S.C. 316(c) (unlike the provisions of Section 216(a) applicable to transportation of passengers), the Commission is with-

out power to compel motor carriers of freight to enter into or maintain through route arrangements, which normally depend upon the tariffs voluntarily filed by the carriers, to provide such joint service. See *Kansas City S. Transport Co., Common Carrier Application*, 10 M.C.C. 221, 235-236 (1938); *Restrictions, Riss & Co., and Eliminations; Hi-Way Motor*, 46 M.C.C. 290, 292 (1946); *Union Pacific Motor Freight Co.-Key Point Restrictions*, 74 M.C.C. 279, 283 (1958). Thus, in *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719 (1942), the Commission issued a cease and desist order against certain carriers adhering to "hot cargo" clauses, but noted that one such carrier had provided in its tariff that it would not interchange traffic; the Commission stated that this provision relieved the carrier from "its preexisting obligation to accept shipments on through bills of lading," and that it need only accept goods on its own bills at the local rate to destination (31 M.C.C. at 721-722).¹⁵ In the present case, one of the connecting carriers (Riss) had already cancelled its through service arrangement with one of the stockholder-carriers (R. 29); there is nothing the Commission could do to prevent other carriers from following suit.

There were, in short, sound reasons for the Commission to prefer the certification process to the compliance process in meeting the transportation problem presented by this case. Appellants urge, however, that the "temporary" character of the labor conditions giving rise to this transportation problem mili-

¹⁵ The combination of local rates is generally higher than a through joint rate.

tated against a grant of permanent certificate authority (Br. in No. 27, p. 21; Br. in No. 28, pp. 17-18). We have already noted that the record amply sustains the Commission's refusal to assume that these labor conditions were transitory or that they would soon be alleviated (see pp. 19-21, *supra*). We note, too, the relevant fact that, notwithstanding the breadth of Short Line's two applications, the Commission's grant of authority was quite limited in scope (see pp. 6, 7, *supra*). Appellant carriers also contend that to certificate a new carrier punishes all of the existing interstate carriers, the "innocent and guilty alike" (*i.e.*, those who had continued to interchange and those who had refused) (Br. in No. 27, p. 23). In truth, of course, the certification process is not a "punishing" process (see R. 244); its purpose is to adjudicate neither "guilt or innocence" nor even (by contrast to the compliance process) faithfulness, *vel non*, to service obligations. Its sole purpose, and the sole end to which the Commission employed it here, is to determine transportation needs and to assure their satisfaction.

The Commission's discretion in choosing the remedies by which it will cope with such service inadequacies as those it confronted in this case was succinctly stated by the three-judge court in *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 219-220 (E.D. Pa.), affirmed, 317 U.S. 587:

* * * In the case at bar the Commission has found that the services of an additional carrier are required over the routes designated in order that the public may have adequate service. It

made no finding that any of the protestant carriers were derelict in their duties, but even if the Commission had made such a finding, we would not conclude that the Commission was thereby prohibited from authorizing an additional, and, if need be, a competing carrier to operate in the field. We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service and there is nothing in any of the sections cited or in their legislative history that would require a contrary conclusion. The conception that the public must wait while the Commission exercises its statutory powers fortified by orders of court, to compel existing carriers to do what they should do, is one which does not commend itself to common sense and the public interest.

That statement was consistent with frequent pronouncements by this Court of the breadth of the Commission's authority to choose which of several remedies will best satisfy the transportation needs at issue. Thus, in *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241, the Court held that "[the Commission's] doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. * * *

It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide." See also *Interstate Commerce Commission v. Parker Motor Freight*, 326 U.S. 60, 70 ("the Commission may authorize the certificate even though the existing

carriers might arrange to furnish successfully the projected service").

Here the Commission, fully recognizing that it had a choice of remedies, carefully articulated its reasons for choosing to proceed by way of a grant of new certificate authority (R. 117-118). This judgment was, we submit, a reasonable one, well within the wide discretion the Commission possesses for developing the appropriate solution to difficult and complicated transportation problems. The court below agreed (R. 246-247), and its decision should be affirmed.

III

THE COMMISSION'S DECISION INVOLVES NO CONFLICT WITH THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

The decision of the Commission now before the Court does not in any way impinge upon appellants' labor agreements or the collective bargaining process. The present decision is limited to a determination that the present and future public convenience and necessity warrant a new service between Omaha and three other points; it does not deal in any way with the merits of any labor controversy or the validity or enforceability of the provisions of any collective bargaining agreement. The Commission expressly refused to construe appellants' labor agreements (R. 115), and the court below agreed that the Commission is not concerned with the contents of labor contracts (R. 254).

The appellant union (but not the appellant carriers) argues that the National Labor Relations Board

possesses "exclusive" jurisdiction of the "facts and circumstances" out of which the inadequacy of service arose (Br. in No. 28, pp. 13-17).¹⁶ The exclusive jurisdiction of the Labor Board is not of "facts and circumstances" in the abstract, but extends only to certain legal relations that flow from a given set of facts and circumstances. Specifically, the jurisdiction of the Labor Board is limited to the regulation of labor-management relations. As this Court stated in *Local 1976, Carpenters' Union v. National Labor Relations Board*, 357 U.S. 93, 110, with respect to motor carriers regulated by the Interstate Commerce Commission:

Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a "strike or concerted refusal," or a "forcing or requiring" of an employer to cease handling goods is a matter of the federal policy governing labor relations. *The Board is not concerned with whether the carrier has performed its obligations to the shipper*, but whether the union has performed its obligation not to induce employees in the manner proscribed by

¹⁶ It is noteworthy that appellant union also argues that a proceeding by the Commission under Section 212 of the Interstate Commerce Act would have been warranted under these circumstances (Br. in No. 28, pp. 18-19; see note 13, p. 25, *supra*). However, it nowhere suggests why its notions of "exclusive jurisdiction" in the NLRB would be any less applicable to such a proceeding than they would be to a Section 207(a) certification proceeding.

§ 8(b)(4)(A). Common factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations. * * * [Emphasis supplied.]

The Court there also considered the Interstate Commerce Commission's role in cases involving the interrelationship between regulated carriers' labor agreements and their service obligations (357 U.S. at 109-110):

It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

The Court recognized, however, that the Commission's exercise of its regulatory authority might, in cases involving controversies in the area of labor-management relations, threaten some impingement upon the jurisdiction of other agencies. Accordingly, it approved (357 U.S. at 109) the cautious approach adopted by the Commission in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957), where, although the Commission held (in the words of

the Court) "that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause," the Commission "was careful to draw [limitations] about its decision"—i.e.,

It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. [It] recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty.¹⁵

357 U.S. at 109. Cf. *Central New England Railway Co. v. Boston & A. R. Co.*, 279 U.S. 415, 418-419.

So "in the present case, the Commission studiously avoided ruling on "the legality or propriety" of "hot cargo" clauses or purporting "to adjudicate any labor dispute or controversy" (R. 115). As an appropriate step in determining whether there was such an inadequacy of service as to warrant the certification of additional service, it did find that the interstate carriers had failed to comply with their service responsibilities, not-

¹⁵ In the *Galveston* case, the Commission had said (73 M.C.C. at 625-626):

"We are here concerned, not with the legality of the 'hot cargo' clauses as such, but with the actions of the defendant carriers in relation to their obligations under the Interstate Commerce Act to the public, without regard to the terms of any contract which they may have executed with a third party. Clearly, a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations."

ing that "[t]hey cannot bargain away their duties and obligation to the public and thereby relieve themselves of such obligations" (R. 116). In so ruling, the Commission followed not only its own prior decisions, including the *Galveston* case, *supra*, see also *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719, 728 (1942), but the decisions of this Court. See *United States v. Village of Hubbard*, 266 U.S. 474, 477 n. 1, citing *New York v. United States*, 257 U.S. 591, settling that a carrier cannot stultify the requirements of the Interstate Commerce Act by simple reference to its private agreements. As Mr. Justice Brandeis stated in *Colorado v. United States*, 271 U.S. 153, 165-166, "even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce."¹⁸

In thus restricting its decision to the transportation problem before it—a problem over which no other agency had jurisdiction—the Commission discharged its statutory functions in a manner entirely faithful to this Court's pronouncements in the *Carpenters'*

¹⁸ And see *Brownwood North & South Ry. Co. v. Railroad Comm.*, 16th F. 2d 297 (W.D. Tex., 1926); *Village of Monticello v. Chicago Great Western R.*, 8 F. Supp. 791 (D. Minn., 1934); *Moeller v. Interstate Commerce Commission*, 201 F. Supp. 583 (S.D. Iowa, 1962). As early as 1934, the Commission rejected the contention that a prior labor agreement or alleged violation of the Railway Labor Act defeated its jurisdiction to issue a certificate under Section 1(18) of the Act, 49 U.S.C. 1(18). *Chicago Great Western R. Trackage*, 202 I.C.C. 227, 230 (1934), 207 I.C.C. 315, 317 (1935). The standard of public convenience and necessity in Section 207 continues the administrative and judicial interpretation of Section 1(18). *Interstate Commerce Commission v. Parker Motor Freight*, 326 U.S. 60, 65.

Union case. There is nothing about its decision that will embarrass any agency or court in ruling upon the legality or enforceability of "hot cargo" clauses, even in the field of transportation by motor carrier. The Commission's decision must thus be judged solely in relation to the Interstate Commerce Act, the National Transportation Policy and the transportation problems with which those enactments are concerned. So judged, we submit, it should plainly be sustained.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

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APPENDIX

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1, provides:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 204(c) of the Interstate Commerce Act, 49 Stat. 546, 49 U.S.C. 304(c), provides:

Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate

whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 207(a) of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. 307(a), provides:

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Section 212(a) of the Interstate Commerce Act, 49 Stat. 555, 49 U.S.C. 312(a), provides:

Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or termi-

nated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210(a), may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962.

No. 27

BURLINGTON TRUCK LINES, INC., ET AL.,

Appellants,

v.s.

**UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND NEBRASKA SHORT
LINE CARRIERS, INC.,**

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY BRIEF.

Certificate of Service Appended at Page 12.

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ARGUMENT.

I.

As might have been expected, Appellees' briefs make every effort to make this case appear to turn upon the sufficiency of the evidence to support the conventional administrative findings with respect to public convenience and necessity. In order to accomplish this purpose they freely interpolate their own version of findings of fact which the Commission itself failed to make, and indeed

could not reasonably have made on the record in this proceeding.

More specifically, the Government undertakes to "show that the record contains substantial evidence from which the Commission could conclude that adequate, economical and efficient motor carrier service was not available to a substantial group of shippers and consignees * * * and that this inadequacy of service was not of such a minor or temporary character as to warrant ignoring it" (Government's Brief, p. 11). Curiously enough, this is exactly what the Commission failed to find explicitly, probably for the very good reason that the record would not support such a finding. The closest that the Commission was able to come to such an explicit finding was simply its ultimate conclusion that the evidence "would appear to establish a need for additional motor service within the scope of the instant application between Omaha, on the one hand, and, on the other, Chicago, St. Louis and Kansas City, restricted to points originating at or destined to points in Nebraska" (R. 109).

The significance of the difference between the very general ultimate finding which the Commission made and the specific finding which the Government so subtly interpolates becomes apparent when attention is focused upon certain basic assumptions of fact which the Government introduces in support of its position without the slightest warrant in the record itself. For example, the Government assumes that the two carriers, Burlington Truck Lines and Santa Fe Trail, which the Commission found "generally maintained normal interline relationships with the stockholder carriers" (R. 104) were incapable of handling all of the traffic offered by or consigned to the non-union carriers. The only basis suggested for this assumption is the negative one that "neither the examiners nor the Commission found that Burlington Truck and Santa

Fe^a Trail provided an adequate substitute service" (Government's Brief, pp. 17-18). This statement not only ignores the obvious principle that it was for the applicant to establish the inadequacy of the already available services, but was also contradicted by repeated statements in Hearing Examiner Sutherland's summary of the evidence that shippers complaining of poor service by some of the interlining carriers had in fact been satisfied when shipments were routed via Burlington or Santa Fe, or would be satisfied if shipments were so routed (R. 30, 34, 36, 40, 41, 42, 45). In short what the evidence showed was that while many of the shippers in this particular area had experienced aggravating delays in their shipments, some of these same shippers had in fact solved their difficulties by shifting the interlining operations to the stronger and more resistant carriers such as Burlington and Santa Fe, while other shippers who had not previously attempted to make such a shift, had no objection to it when the alternative was suggested to them. Nowhere in the record is there a speck of evidence to suggest that the available capacity of Burlington and Santa Fe alone was not amply sufficient to take care of any of the traffic originating from or destined to the stockholder carriers within the scope of the contested grant of authority.

It should also be noted that this available capacity is entirely without reference to the additional capacity made available by what the appellees are pleased to stigmatize as the "belated zeal" of other of the interlining carriers in offering more effective resistance to the Union demands. In addition, Examiner Sutherland specifically found that most of the stockholder carriers had already at the time of the hearing, re-established satisfactory interchange arrangements with a number of the line-haul carriers (R. 64) and that there were only "a few of the applicant stockholders who were having interchange difficulties of any

consequence" (R. 67). To these must be added the additional finding by the Commission itself that "at least one large carrier, Watson Bros. Transportation Co., Inc., changed its policy against interchange with 'unfair' carriers before the close of the hearings herein without experiencing any difficulty" (R. 116).

In the light of these specific findings by the Examiners and the Commission, as well as the failure of the applicant to establish the insufficiency of the alternative services available, it is not surprising that the Commission did not even come close to articulating the conclusion suggested by the Government's Brief that "reliance on a hand-full of interlining carriers with necessarily limited authority and capabilities, in place of the numerous carriers that had interchanged with the stockholder-carriers prior to the service disruption would not be 'adequate' service to shippers and consignees" (Government's Brief, p. 18). Such a finding obviously could not have been made without a factual predicate establishing the available capacity of at least Burlington and Santa Fe, to say nothing of Watson Bros. and others, relative to the amount of traffic which was actually experiencing interchange difficulty. Yet it is a well established rule not only that the burden is upon the applicant to establish the inadequacy of existing available services but also that the shipper has an obligation to seek out such available services before asking for additional service. See *John H. Yourga v. United States*, 191 F. Supp. 373 (1961); *Clyde R. Sauers Extension, East Cambridge, Mass.*, 61 M. C. C. 65, 67 (1952); *Walter C. Benson Co., Inc., Extension*, 61 M. C. C. 128, 130 (1952).

The Government's brief adopts the same technique of ignoring the Commission's findings and substituting its own theory of the case when it deals with the labor aspects of this controversy. Thus it challenges appellant carriers' characterization of the service disruption as "transitory"

on the ground that appellant Union still argues that under *Local 1976, Carpenters' Union v. National Labor Relations Board*, 357 U. S. 93, and the 1959 Amendment of the National Labor Relations Act (73 Stat. 543) "a protection of rights clause (hot cargo) would not necessarily violate the Labor Act," and adds: "The Commission does not doubt its lack of competence to resolve that controversy" (Government's Brief, p. 23). In thus pouncing gleefully upon an apparent inconsistency between the appellant carriers and the appellant Union's position, the Government conveniently forgets that it was the Commission's opinion which first relied upon the *Carpenters' Union* case when it said:

"The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by mere acquiescence in the boycott, the unionized carriers lose the protection which Section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby." (See *Carpenters' Union v. Labor Board*, 357 U. S. 93.) (R. 117.)

The Government also appears to forget that it was the Commission in its Motion to Affirm which first suggested that the "1959 Amendment of the National Labor Relations Act, which became effective approximately six months after the decision in this case, appears to have obviated the likelihood of a recurrence elsewhere of the particular problem which led to the grant of the certificate" (Motion to Affirm, p. 11.)

In referring to the "transitory circumstances of complex labor disputes" the appellant carriers were not asking this Court to be so naive as to believe that appellant Union would meekly relinquish its resolution to enforce the union-

ization of the Nebraska carriers or give up its attempt to enforce the "hot cargo" or "protection of rights" clauses of its contracts, in deference either to the *Carpenters' Union* case or the 1959 amendment to the Labor Act. Indeed, appellants' opening brief called attention to the fact that the immediate effect of the grant of authority to Nebraska Short Line, as indicated by the records of the Labor Board (See Jurisdictional Statement, Appendix D, pp. 190-191), had apparently been to shift the focus of the Union's attack to whatever point Short Line first came into contact with the unionized world around it. The transitory nature of the labor controversy was nevertheless reflected in the increasing effectiveness, as found by the Commission (R. 116), of the resistance of the original interlining carriers to the Union's attempt to require their cooperation in achieving the objectives of the "hot cargo" clauses. The significance of the general legal developments such as this Court's decision in the *Carpenters' Union* case and the 1959 amendment of the statute is that they both tended to strengthen the interlining carriers' powers of resistance and also armed the originating or delivering carriers with a more effective direct remedy against union interference with the interlining operations. Thus the effect of both this Court's decision and the statutory amendment was simply to undermine the Commission's own ill-conceived reliance upon Section 8(b)(4)(A) of the Labor Management Relations Act of 1947 as a justification for its decision (R. 117).

II.

The Government's Brief persists in its vigorous and imaginative rewriting of the Commission's opinion by formulating new justifications for the Commission's rejection of Examiner Sutherland's suggestion that a more appropriate remedy would be a complaint proceeding under Section

204(c) of the Act. In the first place, the Government ignores the obvious relevance of the Commission's own reasoning to a complaint proceeding rather than a certifying proceeding. For example, the Solicitor General does not mention the following explanation offered by the Commission:

"We do not hold that all instances of refusal to provide service are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers." (R. 116.)

In short, it was the supposedly supine acquiescence in the demands of the Union which the Commission found particularly inexcusable.

This is a far cry from the Solicitor General's suggestion that the Commission might well have considered "the possibility, for example, that if it ordered the existing carriers to interchange, attempted compliance might so aggravate their labor difficulties so as to cause a complete cessation of operations" (Government's Brief, p. 26). Abstractly considered, the Solicitor General's suggestion might conceivably afford a more reasonable basis for the Commission's decision. The only difficulty with the suggestion is that it is utterly inconsistent with the Commission's own reasoning, as set forth above.

Equally theoretical, and without foundation in the Commission's opinion or the evidence in the record, is the Solicitor General's suggestion that the interlining carriers, if subjected to an order under Section 204(c), might have responded simply by canceling "tariffs voluntarily filed to provide such joint service" (Government's Brief, p. 27). Of course, the Solicitor General is correct in his law in observing that Section 216(a) of the Statute permits a motor carrier to do this with respect to its freight traffic. What he does not explain is how the carriers here involved could have followed such a course on any significant scale without in effect abandoning their claim that they were providing service for the territory here under consideration. It is true that the Solicitor General does pick up one isolated fact in the record which he suggests provides support for his hypothesis. This is the following statement in Examiner Sutherland's Report: "As to Clark, it has received only one cancellation notice on concurrences, from Riss and Company." (R. 29.) The Solicitor General might also have noted that Riss and Company is not a party to these proceedings and is never again mentioned in the record as being in any way concerned with this traffic. So far as appears, Riss has no interest at all either in this controversy or the traffic that is here involved. Presumably if the appellant carriers were equally indifferent, they too might cancel their through tariffs with the stockholder-carriers. It is, however, difficult to conceive of their doing so as long as they have any hope of retaining the traffic and resisting the entrance of a new competitor in the field.

In short, it seems obvious that the "sound reasons" suggested by the Solicitor General "for the Commission to prefer the certification process to the compliance process, in meeting the transportation problem presented by this case" (Government's Brief, p. 27) are not the reasons

which the Commission had in mind, nor are they supported by any of the findings or evidence in this case. On the contrary, it seems equally evident that the reasoning of the Commission, with its emphasis upon the failure of some of the carriers to offer appropriate resistance to the Union's demands, points unmistakably in the direction of the more individualized orders under Section 204(c) dealing with such offending carriers. If the Commission did indeed have any reason to doubt the efficacy of such orders, it could also have continued the temporary authority of the applicant until such a remedy had been attempted and there was some factual basis for judging the reality of the Solicitor General's apprehensions.

It is equally inconsistent with the Commission's reasoning, and unrealistic on this record, for the Solicitor General to tell us now that "the certification process is not 'punishment' . . . ; its purpose is to adjudicate neither 'guilt or innocence' nor even (by contrast to the compliance process) faithfulness *vel non* to service obligations" (Government's Brief, p. 28). The fact remains that after finding that some of the carriers had failed faithfully to discharge their obligations, without sufficient excuse, the Commission certificated a new carrier to compete with all of them. The new carrier is, of course, not limited to the traffic with respect to which the interlining difficulties occurred; neither is it limited to the traffic originated by or destined to the stockholder-carriers. Although such traffic may be the immediate source of its revenues, the successful applicant is free to branch out and compete for any traffic within the scope of its certificate—that is, all traffic between Omaha, on the one hand, and Chicago, St. Louis or Kansas City, on the other, over certain specified routes, originating at or destined to points in Nebraska. This, as the Examiners found, is the traffic which the protestant carriers have been enjoying; it is also the traffic

for which these carriers, as the Examiners found, have more than sufficient available capacity. Whether or not the operations of Nebraska Short Line have already injured any of the appellant carriers in any substantial amount, can hardly be determined on this record. There can, however, be no doubt, as a result of the Examiners' findings, adopted by the Commission, of the potentiality of such damage so long as the certificate remains outstanding.

It is also pertinent to observe that the certificate granted to Nebraska Short Line is in no way limited to the peculiar circumstances which supposedly justified its issuance. It is true that the applicant stated that "under no conditions" would it ever agree to a union contract containing any hot cargo provisions" and that "it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternative of signing such a contract or going out of business, it would surrender its certificate for cancellation" (R. 83). Of course the Commission ignored this offer; its inclusion in the certificate could hardly be justified under the Interstate Commerce Act unless all certificates were so conditioned. For as the Solicitor General now emphatically tells us, it is for the National Labor Relations Board, not the Interstate Commerce Commission, to determine the validity of "hot cargo" or "protection of rights" clauses. Consequently, if such clauses are indeed valid, the successful applicant, like the protestant carriers, may eventually be induced or forced to accept one; or, it may elect instead to transfer its certificate to some other operator committed to unionized labor relations and willing to operate under the same labor contracts as the other interlining carriers. If, on the other hand, the Labor Board eventually determines that such contractual provisions are completely invalid, then even the unionized carriers will have no difficulty in carrying out their normal practice of interchanging free-

ly with the non-unionized carriers. In either event, the issuance of the new certificate will have served no useful purpose except to add a new competitor to serve under the same conditions as the older carriers, irrespective of the continuance of the original difficulties arising from the labor dispute. One could hardly ask for a better illustration of why the issuance of a permanent certificate to a non-unionized carrier was ill-adapted to serve as the solution for "service inadequacies" which the Commission found were occasioned by the labor difficulties and why, at the very least, such a remedy should be used only as a last resort when all other more appropriate avenues of relief, both under the Interstate Commerce Act and under the National Labor Relations Act, have been tried and found wanting.

For the foregoing reasons, as well as those stated in applicant's original brief, the decision of the District Court should be reversed, and the order of the Commission set aside.

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PROOF OF SERVICE.

I, DAVID AXELROD, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of October, 1962, I served copies of the foregoing Reply Brief of Appellants on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid, to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to L. K. Ray, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

DAVID AXELROD,

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